



**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY AND
THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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No. 92-1911

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I. QUESTION PRESENTED

Whether the Washington Department of Ecology exceeded its legal authority when it imposed a condition in a water quality certification requiring a minimum instream flow to preserve and protect salmon and Steelhead trout in the Dosewallips River?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves a challenge to a condition in a water quality certificate issued by the Washington Department of Ecology (Ecology). The condition requires the City of Tacoma and PUD No. 1 of Jefferson County (Petitioners) to maintain a specified minimum instream flow during operation of a proposed hydroelectric project. The minimum instream flow is necessary to preserve

salmon and other fish in the affected portion of the Dosewallips River.

II. STATEMENT OF THE CASE

A. Regulatory Framework.

1. *The Washington State Water Pollution Control Act, Wash. Rev. Code (RCW) Ch. 90.48 (1992)*. Chapter 90.48 RCW is Washington's primary water quality statute. RCW 90.48.035 authorizes Ecology to promulgate regulations to implement the statute, including "standards of quality for waters of the state." RCW 90.48.260 authorizes Ecology to implement state authority under the Federal Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.* (1988), including the establishment of water quality standards. RCW 90.48.260(1)(b).

Pursuant to RCW 90.48.035 and .260, Ecology first promulgated state water quality standards in 1973. Wash. Admin. Code (WAC) Chapter 173-201 (1990).¹ The water quality standards, which are an integral part of Washington's water quality protection program, do a number of things. First, general requirements are established, including antidegradation requirements. WAC 173-201-035. Second, the standards establish a water classification system ranging from Class AA (extraordinary) to Class C (fair). For each class a range of characteristic uses is defined. WAC 173-201-045 and -080. Then, numeric and narrative water quality

¹ The water quality standards which apply to this case are reproduced in Appendix L. The water quality standards were recodified as ch. 173-201A WAC in 1992.

criteria are set for each of these classes.² Finally, the standards address toxic substances. WAC 173-201-047.

The water quality standards classify the Dosewallips River as Class AA (extraordinary). WAC 173-201-080(32). The characteristic uses of Class AA waters include salmonid and other fish "migration, rearing, spawning" and "wildlife habitat." WAC 173-201-045(1)(b). Finally, WAC 173-201-035(8) reads, in part, as follows:

The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(A) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

....

(F) In no case will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term harm to the environment.

2. *The Water Resources Act of 1971, Ch. 90.54 RCW (1992)*. Chapter 90.54 RCW authorizes Ecology to manage the state's water resources according to certain principles. RCW 90.54.020(3)(a) authorizes Ecology to set

² Other than toxic substances addressed at WAC 173-201-047, the standards include numeric criteria for six water chemistry parameters. These are: 1) fecal coliform organisms; 2) dissolved oxygen; 3) total dissolved gas; 4) temperature; 5) pH; and 6) turbidity. WAC 173-201-045(1)(c).

minimum instream flows to protect certain instream values. RCW 90.54.020(3)(a) reads as follows:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

3. *The Clean Water Act, 33 U.S.C. § 1251, et seq. (1988)*. The CWA was enacted with the purpose of protecting the "physical, chemical and biological integrity" of the Nation's waters. 33 U.S.C. § 1251(a). To achieve this purpose, the CWA utilizes a combination of "end of pipe" pollution control measures, e.g., effluent limits under § 301, 33 U.S.C. § 1311, and receiving water standards, e.g., water quality standards under § 303, 33 U.S.C. § 1313.

Section 401 of the CWA authorizes the states to issue a water quality certificate for any project or activity which 1) will require a federal permit; and 2) may result in a discharge to navigable waters. However, the certificate may only be issued if the project or activity will comply with certain provisions of the CWA, including §§ 301 and 303. 33 U.S.C. § 1341(a). Section 401(d) authorizes the states to impose conditions in a certificate to ensure compliance with certain provisions of the CWA and with "any other appropriate requirement of state law."³

³ Section 401 is reproduced in full in Appendix M, pp. 123a-128a.

Prior to the enactment of § 401 in 1972, states were limited to ensuring that projects subject to the water quality certificate requirement would comply with state water quality standards.⁴ That authority was expanded by § 401, which authorizes states to ensure compliance with water quality standards, with several other requirements of the CWA, and, as mentioned above, with "any other appropriate requirement of state law."

4. *The Federal Power Act (FPA), 16 U.S.C. §§ 791-828*. The FPA was first enacted in 1920. The purpose of the FPA was to create a federal regulatory scheme for certain power-producing facilities, including hydroelectric projects. In 1946 this Court decided *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). In *First Iowa* this Court ruled that the FPA preempts state law when a conflict or potential conflict exists between the federal statute and state law. *California v. FERC*, 495 U.S. 490 (1990), affirmed *First Iowa's* holding that the

⁴ Section 21(b) of the Water Quality Improvement Act of 1970, which was § 401's predecessor, reads, in pertinent part, as follows:

b.(1) Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the state in which the discharge originates . . . that there is reasonable assurance, as determined by the state . . . that such activity will be conducted in a manner which will not violate applicable water quality standards. . . .

FPA preempts state law where there is a conflict between the federal statute and state law.⁵

Congress created an explicit exception to the FPA's comprehensive regulatory scheme when it enacted § 401 of the CWA, which authorizes states to issue, deny, or condition water quality certificates for certain federally licensed projects, including hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC).⁶

B. The Dosewallips River And The Proposed Elkhorn Hydroelectric Project.

The Dosewallips River originates in the glaciers of the eastern Olympic Mountains and flows east to Hood Canal in western Puget Sound. Currently, the river is largely undisturbed by human activity and is being studied for possible inclusion on the National Wild and Scenic Rivers list. Approximately one-half of the Dosewallips River is located in Olympic National Park, and the proposed Elkhorn diversion dam is to be sited just outside the park boundary. At the dam, most of the river's water will be diverted out of the river and into a large pipe (penstock). The water will be returned to the river 1.2

⁵ Cf. *Soyles Hydro Ass'n v. State Water Resource Control Bd.*, 985 F.2d 451 (9th Cir. 1993) (holding that the FPA occupies the field with regard to hydropower licensing).

⁶ Legislative history explains that Congress was well aware of § 401's impact on the FPA's licensing scheme:

Should [a § 401 certificate] . . . denial occur no license or permit could be issued by such federal agencies as the Atomic Energy Commission, Federal Power Commission [now FERC], or the Corps of Engineers unless the state action was overturned in the appropriate courts of jurisdiction.

(Emphasis added.) S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in 1972 U.S.C.C.A.N. 3735.

miles downstream. Thus, the mostly de-watered "bypass reach" will be approximately 1.2 miles in length.

The river supports populations of salmon, Steelhead trout (Steelhead), and resident trout which have thrived historically but are now severely depleted. The decline of the fishery resource in the Dosewallips is emblematic of the decline of salmon and Steelhead in the Northwest.⁷ These fish are tremendously important, both economically and culturally, to the Northwest.⁸ The minimum instream flow required by the state may not stop the decline of this resource, but the evidence presented at trial is clear that without it, one section of the Dosewallips River will be lost as habitat for salmon and Steelhead.

C. Proceedings Below.

In 1982 Petitioners applied to FERC for a major hydroelectric license for the proposed Elkhorn project. From 1982-85 fishery experts from the Washington Departments of Ecology, Fisheries and Wildlife, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council (a consortium of Indian tribes which have historically fished in the Dosewallips River and Hood Canal) worked with the Petitioners on a complex study of the bypass reach. The study was conducted to determine the minimum amount of river flow necessary to protect and preserve salmon and

⁷ In a seminal study entitled *Pacific Salmon at the Crossroads*, the Endangered Species Committee of the American Fisheries Society identifies 214 Pacific salmon stocks that face a risk of extinction or are of special concern. The study notes that the Spring Chinook salmon run in the Dosewallips is at or near extinction. W. Nehlsen, et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho and Washington*, 16 Fisheries, No. 2 (March-April 1991).

⁸ See Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 102, 94 Stat. 3275 (1980).

Steelhead in the bypass reach. At the conclusion of the study, all parties attempted to reach agreement with regard to the necessary instream flow. In October 1985, the agency experts set an instream flow which they believe is the minimum necessary to preserve and protect the bypass reach as viable habitat for salmon and Steelhead.⁹

On June 11, 1986, Ecology issued a water quality certificate (hereinafter referred to as § 401 certificate) for the Elkhorn project. The certificate includes a condition requiring the minimum flow set by the agencies.¹⁰

On July 14, 1986, Tacoma appealed the § 401 certificate to the Pollution Control Hearings Board (PCHB). On two different cross motions for summary judgment, the PCHB ruled that the minimum flow condition is appropriate under state and federal law. The primary basis for the PCHB's ruling was the "other appropriate requirement of state law" provision of § 401(d) of the CWA. The PCHB held that this provision authorizes Ecology to impose conditions necessary to ensure compliance with state laws that are related to water

⁹ Petitioners have proposed three different minimum flows. Exhibit R-3, which was submitted at trial (App. 86a) reflects the agencies' minimum flow and Petitioners' first two proposals. Petitioners revised their proposal a third time at trial.

¹⁰ Petitioners make much of a statement in the certification that the flows are in excess of those required to maintain water quality in the bypass reach, but are included for purposes of protecting the fishery resource. That statement was clarified, however, by an affidavit of its author, Mr. Walter Bergstrom, which was submitted to the Pollution Control Hearings Board (PCHB) in support of Ecology's Motion for Summary Judgment before the PCHB. The affidavit explains that the term "water quality" as used in the statement in question refers to water temperature only. Thus, as the affidavit states, the phrase "while these flows are in excess of those required to maintain water quality" means that the flows are in excess of those required to meet Washington's water quality standard for temperature. (WAC 173-201-045(1)(c)(iv).) (App. 100a.)

quality. The PCHB reasoned that the minimum flow is necessary to ensure compliance with RCW 90.54.020(3)(a); that this state statute is an appropriate requirement of state law under § 401(d) because it is related to water quality; and, therefore, that the minimum flow condition is within the scope of authority granted to Ecology under § 401(d). The PCHB also rejected Petitioners' argument that the FPA preempts the minimum flow condition. (App. 71a.)

On February 24, 1989, the state and Petitioners appealed the PCHB's decision to Thurston County Superior Court. The superior court affirmed the PCHB's ruling that the minimum flow condition is authorized by § 401(d) of the CWA and that the minimum flow condition is not preempted by the FPA. (App. 42a.)

Petitioners appealed the superior court judgment to the Washington Supreme Court. The Washington Supreme Court issued its unanimous decision on April 1, 1993. The supreme court affirmed the superior court's judgment, ruling that the minimum flow condition is appropriate under § 401(d) and that the minimum flow condition is not preempted by the FPA. (App. 28a.)

III. REASONS FOR DENYING THE PETITION

The decision below consists of three rulings. The first is that the minimum flow is necessary to ensure compliance with state water quality standards. The second is that the minimum flow is necessary to ensure compliance with "other appropriate requirement[s] of state law," under § 401(d), specifically RCW 90.54.020(3)(a). The third is that the minimum flow condition is not preempted by the FPA.¹¹ The remainder of this brief addresses each of

¹¹ Petitioners have modified the preemption argument they made below. Now Petitioners argue that the decision below fails to properly harmonize the CWA and the FPA.

these issues and will explain that review by this Court is unnecessary and inappropriate. To begin with, the water quality standards basis for the decision below raises no federal issue and is based on adequate and independent state grounds. Second, the decision below properly interprets § 401(d)'s "other appropriate requirement of state law" provision. Third, the decision below properly harmonizes the CWA and the FPA.

A. The "Water Quality Standards" Basis For The Washington Supreme Court's Decision Raises No Issue Of Federal Law And Is Based On Adequate And Independent State Grounds.

1. The Decision Below. Petitioners argue that this case raises important questions regarding the proper interpretation of the CWA and the FPA, and the interplay between these two federal statutes. Petitioners also contend there is a difference of opinion among state courts regarding these important federal questions. In fact, however, state water quality standards provide the primary basis for the Washington Supreme Court's decision, and Petitioners concede that these state law standards are an appropriate basis for conditioning a § 401 certificate.

The Washington Supreme Court's judgment is based, first and foremost, on its determination that the minimum flow is necessary to ensure compliance with state water quality standards. A unanimous court stated its ruling as follows:

The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate. Ecology contends that the stream flow conditions in the 401 certificate issued to Tacoma were necessary to assure

compliance with Washington's water quality standards. We agree.

...
In short, section 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dosewallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

(App. 7a-8a.) (Emphasis added.)

2. Petitioners Concede That Water Quality Standards Are An Appropriate Basis For Conditioning A § 401 Certificate. As the court below notes, Petitioners acknowledge that water quality standards are an appropriate basis for conditioning a § 401 certificate. (App. 7a.) Indeed, Petitioners have consistently argued from the outset of this case that water quality standards are the *only* legitimate basis for such a condition. Significantly, Petitioners continue to make this concession before this Court. For example, on page 15 of the Petition for Writ of Certiorari, Petitioners state: "Congress, however, confined states' certificate authority to *water quality standards* and other limitations regulating the discharge of

pollutants expressly enumerated in § 401." (Emphasis added.)

3. *All Relevant State Court Decisions Agree That Water Quality Standards Are An Appropriate Basis For Conditions In A § 401 Certificate.* Not only do Petitioners take the position that water quality standards are an appropriate basis for conditioning a § 401 certificate, but every court which has addressed the issue also reaches this conclusion. In *Georgia Pacific Corp. v. Department of Envtl. Conservation*, 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992), petition for certiorari pending, No. 92-1012, *sub nom. Simpson Paper (Vermont) v. Department of Envtl. Conservation*, the Vermont Supreme Court upheld a minimum flow condition in a § 401 certificate. The primary basis for the court's ruling was its finding that the minimum flow was necessary to ensure compliance with the state's water quality standards.¹² See *Bangor Hydro-Electric Co. v. Board of Envtl. Protection*, 595 A.2d 438 (Me. 1991) (holding that state may deny § 401 certificate based on lack of compliance with state water quality standards); *Hi-Line Sportsmen Club v. Milk River Irrig. Dist.*, 786 P.2d 13 (Mont. 1990) (overturning state issuance of § 401 certificate based on lack of evidence that conditions imposed by the state would ensure compliance with water quality standards and other state water quality laws); *City of Klamath Falls v. Environmental Quality Comm'n*, 851 P.2d 602 (Or. App. 1993) (affirming state's

¹² This Court requested the views of the United States on the pending Petition for Writ of Certiorari in the *Georgia Pacific* case. ___ U.S. ___, 122 L. Ed. 2d ___, 113 S. Ct. 1410 (1993). The Solicitor General presented the United States' view that certiorari would not be appropriate because the primary basis for the Vermont Supreme Court's decision was that the minimum flow condition was necessary to ensure compliance with state water quality standards. The Solicitor General recognized that this constituted an adequate and independent state ground for the decision, which was not appropriate for review by this Court.

denial of § 401 certificate based on proposed hydroelectric project's noncompliance with state water quality standards); and *Arnold Irrig. Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. App. 1986) (holding that states may enforce all state water quality-related laws, including water quality standards).

Even the New York cases, upon which Petitioners rely so heavily, hold that water quality standards are an appropriate basis, albeit the only appropriate basis, for a condition in a water quality certificate. *de Rham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973); *In re Power Auth. v. Williams*, 457 N.E.2d 726 (N.Y. 1983); *Niagara Mohawk Power Corp. v. DEC*, 592 N.Y.S.2d 141 (1993); *Long Lake Energy Corp. v. DEC*, 563 N.Y.S.2d 871 (1990); and *Fourth Branch Assocs. v. DEC*, 550 N.Y.S.2d 769 (1989).¹³

In summary, every court which has addressed the issue agrees with the court below (and with the Petitioners) that state water quality standards are an appropriate basis for conditioning a § 401 certificate, i.e., such conditions are within the scope of authority provided to states by § 401 and are not preempted by the FPA.

4. *The Water Quality Standards Basis For The Decision Below Raises No Issue Of Federal Law.* The full scope of authority provided to states by § 401 is an issue of federal law, requiring, as it does, interpretation of the CWA. It is uncontested, however, that § 401 authorizes states to impose conditions necessary to ensure compliance

¹³ Supreme Court Rule 10 provides considerations governing review of Petitions for Writ of Certiorari. Petitioners argue that review is appropriate in this case under Rule 10.1.(b) because there are conflicting state court decisions on the issues presented. As explained above, there are no conflicting state court decisions with regard to the water quality standards basis for the decision below.

with state water quality standards. Petitioners concede this point, and every court which has addressed the issue reaches this conclusion. Simply put, it is well settled that § 401 authorizes states to impose conditions based on water quality standards. Thus, the federal question regarding water quality standards has been answered, and Petitioners do not challenge that answer before this Court.

5. The "Water Quality Standards" Basis For The Decision Below Constitutes An Adequate And Independent State Ground. The only issue raised by Petitioners with regard to the water quality standards basis for the decision below involves the substantive requirements of the standards themselves. Obviously, what the standards require for the Dosewallips River is a question of state law. The state supreme court ruled that the state's water quality standards require Ecology to ensure that the proposed Elkhorn hydroelectric project will not degrade fish habitat, migration, and spawning in the Dosewallips River. This Court should defer to the rulings of Washington's highest court on questions of Washington State law. See *Michigan v. Long*, 463 U.S. 1032 (1983); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

In conclusion, the water quality standards basis for the decision below is inappropriate for review by this Court. This is so because it raises no contested issue of federal law, and the basis for the decision is state law. As such, the decision below is based on adequate and independent state grounds which should not be reviewed by this Court.

B. The State Water Quality Standards Require The Preservation And Maintenance Of Designated "Characteristic Uses" Such As Fish Habitat, Migration, And Spawning.

1. The Water Quality Standards. Petitioners argue that only the "criteria" portion of the state's water quality standards are enforceable and that all of the other provisions contained in the standards, including the characteristic uses and the antidegradation requirements, are not. In making this argument, and in an attempt to federalize the issue, Petitioners rely solely on the CWA and certain of its implementing regulations, while neglecting to cite, quote from, or even mention the terms of the state's water quality standards. This is not surprising, given the clarity with which the state's standards contradict Petitioners' argument.

As explained above, Washington's water quality standards classify the Dosewallips River as Class AA (extraordinary) and identify salmon and other fish migration, rearing, and spawning as characteristic uses of the river. WAC 173-201-080(32) and -045(1)(b). WAC 173-201-035(8)(a), one of the antidegradation requirements contained in the standards, reads as follows:

Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

These sections of Washington's water quality standards, especially the antidegradation requirements, make one thing absolutely clear -- no degradation of the state's waters is to be allowed which will interfere with or eliminate a characteristic use. The standards identify salmon and Steelhead migration, rearing, spawning, and harvesting as characteristic uses of the Dosewallips River. Thus, as the Washington Supreme Court ruled, the state is *required* to ensure that the Elkhorn project will not "interfere with or become injurious to" usage of the Dosewallips by salmon and Steelhead. (App. 7a.) _____

The minimum flow condition required by the state is designed to accomplish exactly that. Only with the state's minimum flow, which was set after three years of study by expert fisheries biologists, will salmon and Steelhead usage of the Dosewallips River be adequately protected.

2. *The CWA And EPA's Implementing Regulations Support The Washington Supreme Court's Reading Of The State Water Quality Standards.* Rather than address the state's water quality standards, Petitioners rely on the CWA and EPA's implementing regulations in arguing that only the criteria portion of the state water quality standards are enforceable. As just explained, Petitioners' argument is flatly contradicted by the terms of the state's water quality standards. Likewise, the CWA and EPA's regulations also directly contravene Petitioners' argument.

Indeed, the very section of the CWA cited by Petitioners supports the state's position. Section 303(2)(a) of the CWA states that water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Rather than supporting Petitioners, § 303(c)(2)(a) supports the decision below by expressly defining the water quality standards to include both the designated uses and the criteria. This section goes on to read "such standards shall be such as to protect the public health or welfare, enhance the quality of water and *serve the purposes of this chapter.*" (Emphasis added.) The purpose of the CWA is set forth, in part, in § 101(a), 33 U.S.C. § 1251(a), which states:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Section 303(c)(2)(a) and § 101 of the CWA make it abundantly clear that Congress was concerned with more than the chemical quality of the Nation's waters. Rather, the CWA was enacted to ensure that existing characteristic uses are protected and that the full integrity of the Nation's waters, including chemical, physical, and biological integrity, be maintained. In short, Petitioners' proposed interpretation of Washington's water quality standards is entirely inconsistent with the terms and the purpose of the CWA.

Likewise, there is no conflict between EPA's water quality standards regulations and the decision below. Again, the very regulation cited by Petitioners supports the state in this case. 40 C.F.R. § 131.2 (1992) reads, in part, as follows:

States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife

40 C.F.R. § 131.4 explains that states are responsible for establishing water quality standards and that states may adopt standards more stringent than required by EPA's regulations. 40 C.F.R. § 131.10(a) states that "[e]ach state must specify appropriate water uses to be achieved and protected." Finally, and most importantly, 40 C.F.R. § 131.12 requires that each state adopt a statewide antidegradation policy and identify the methods for

implementing such policy.¹⁴ 40 C.F.R. § 131.12(a)(1) reads as follows:

The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

Thus, Washington's antidegradation requirements, which require the protection of existing uses, are not only consistent with, but are required by, EPA's regulations.¹⁵

Quite simply, Washington's water quality standards are entirely consistent with the terms of the CWA and EPA's implementing regulations. The state's standards, like the federal standards, do not limit the state to scrutinizing the chemical quality of the state's waters while blindly ignoring the fact that characteristic uses are threatened or eliminated. To the contrary, the state and federal standards require that characteristic uses be protected and maintained.¹⁶

¹⁴ In 1987 Congress ratified EPA's antidegradation requirements when it enacted § 303(d)(4)(B), which incorporates the antidegradation standard. 33 U.S.C. § 1313(d)(4)(B). See *Columbus and Franklin County v. Shank*, 600 N.E.2d 1042, 1054 (Ohio 1992).

¹⁵ EPA approved Washington water quality standards on October 28, 1977. 42 Fed. Reg. 56786 (1977).

¹⁶ Judicial interpretations of water quality standards similar to Washington's support the decision below. In *Bangor*, 595 A.2d 438, the Maine Supreme Court was faced with Petitioners' argument here, i.e., that only the criteria portion of the water quality standards are enforceable and that designated uses are not. The Maine Supreme Court rejected this argument, stating: "[w]e cannot conclude that the designated uses included in section 465 are mere surplusage" and that designated uses "are an integral part of the state

The Petitioners' argument is an extreme example of form over substance. They argue that the state is required to ignore the Elkhorn project's adverse impact or even elimination of salmon and Steelhead in the affected portion of the river, as long as certain chemical parameters are met. What is the point of maintaining the Dosewallips River at 16° celsius and a pH of 6.5-8.5, when there is insufficient water in the river for fish? The lack of merit in Petitioners' position is self-evident.

C. The Decision Below Properly Interprets § 401(d) Of The CWA And Properly Harmonizes The CWA And The FPA.

As explained above, the water quality standards are one of the three bases for the decision below. We have just explained that the water quality standards are an adequate and independent state ground for that decision. We will now address the other two bases for the decision below. The first is the lower court's ruling that the minimum flow condition is appropriate because it is necessary to ensure compliance with an "other appropriate requirement of state law" under § 401(d). The second is the lower court's ruling that the FPA does not preempt the minimum flow requirement. As mentioned previously, Petitioners no longer argue that the FPA preempts the minimum flow condition. Rather, they argue that the decision below fails to properly interpret the interplay between the FPA and the CWA and is inconsistent with FERC's licensing authority under the FPA. As explained

water quality standards." *Id.* at 442-43. See also *In re Issuance of Permit*, 576 A.2d 784 (N.J. 1990) ("It is self-evident that the purpose of the antidegradation policy is to protect existing water uses and to maintain present water quality. No irreversible changes may be made to existing water quality that would impair or preclude attainment of the designated uses of the waterway." *Id.* at 791; *Columbus and Franklin County*, 600 N.E.2d 1042; *Hi-Line Sportsmen*, 786 P.2d 13.

below, neither of these rulings raise substantial federal questions appropriate for review by this Court.

1. The Decision Below Properly Interprets § 401(d)'s "Any Other Appropriate Requirement of State Law" Provision. Petitioners argue that the "other appropriate requirement of state law" provision of § 401(d) only authorizes states to ensure compliance with state water quality standards. This is a relatively difficult argument to make since § 401(d) does not mention water quality standards at all. Nevertheless, we agree that water quality standards are one appropriate basis for a condition in a § 401 certificate. There is simply no authority in the CWA, however, for the proposition that water quality standards are the only legitimate basis for such a condition.

The court below ruled as follows:

We hold that the streamflow conditions Ecology included in the 401 certificate it issued to Tacoma were an appropriate measure to assure compliance with Washington's water quality standards. We also hold that a section 401 water quality certificate may include conditions to enforce all state water quality-related statutes and rules, including but not limited to, state water quality standards.

(App. 13a.) This ruling gives proper effect to § 401(d) and is supported by all persuasive authority addressing this issue.

a) The terms of § 401(d). First, and most important, the decision below is consistent with the terms of § 401(d). The fatal flaw in Petitioners' argument is that it fails to give any effect to the "other appropriate requirement of state law" provision of the statute. It is

axiomatic that congressional enactments are to be interpreted such that every word, clause, and sentence of a statute is given effect. *United States v. Nordic Village, Inc.*, 503 U.S. ___, 112 S. Ct. 1011 (1992); *United States v. Gooding*, 25 U.S. 460 (1827).

The Court below relied on § 101(a), the purpose section of the CWA, for guidance in interpreting § 401(d). This is most appropriate. *Crandon v. United States*, 494 U.S. 152, 158 (1990). Section 101(a)'s reference to "physical, chemical and biological integrity" is compelling evidence of Congress's concern with ecosystems and the overall health of the Nation's waterways and its rejection of the hopelessly limited approach suggested by Petitioners.¹⁷

b) Legislative history of § 401(d). The legislative history of § 401(d) also supports the decision below. As mentioned above, the predecessor to § 401 was § 21(b) of the Water Quality Improvement Act of 1970. Section 21(b) did not contain the "other appropriate requirement of state law" phrase contained in § 401(d) and expressly limited states to determining whether the discharge would violate water quality standards.

Section 401's legislative history explains that under its provisions states are not limited to considering water quality standards. Rather, states are required to ensure compliance with "any water quality requirements

¹⁷ Petitioners suggest that the decision below is inconsistent with the well-recognized rule of statutory construction referred to as *ejusdem generis*. Petitioners argue that § 401(d)'s references to sections of the CWA are limited to provisions of the statute which deal solely with discharges of pollutants. As explained above, water quality standards, which Petitioners admit are an appropriate basis for § 401 certificate conditions, deal with water uses and broad water quality concerns like biologic quality. The water quality standards are simply not limited to setting limits for discharges of pollutants. Thus, Petitioners' *ejusdem generis* argument is without merit.

established under state law." S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3735. Obviously, this refers to more than just water quality standards. Moreover, the senate conference report recognizes that § 401(d) "expanded" state authority over that which was provided by the Water Quality Improvement Act. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 138 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3815. Thus, the legislative history supports the ruling below that § 401(d) allows states to ensure compliance with water quality standards and with other water quality-related requirements.¹⁸

c) *Judicial interpretation of § 401(d)*. The decision below is also consistent with most of the state court cases interpreting § 401. Many of these cases have been discussed above; we simply note here that the more thoughtful state court decisions addressing this issue have concluded that states may require compliance with state water quality laws, including, but not limited to, water quality standards, in conditioning a § 401 certificate. See *Arnold Irrig. Dist.*, 717 P.2d at 1279 (§ 401 allows "the states to enforce all water quality-related statutes and rules through the state's authority to place limitations on section [401] certificates"); *Hi-Line Sportsmen*, 786 P.2d at 16

¹⁸ The decision below is also consistent with EPA's interpretation of § 401. Attached as Appendix K, pp. 90a-93a, is a letter dated January 18, 1991, from Ms. LaJuana S. Wilcher, an assistant administrator with EPA to the Honorable Lois D. Cashell with FERC. The letter states that it was written on behalf of EPA's Office of Water Enforcement and Permits "to help clarify issues regarding the application of Clean Water Act § 401 state water quality certification to Federal Energy Regulatory Commission (FERC) licenses." This letter explains that "protection of water quality involves far more than just addressing water chemistry." The letter fully supports the minimum flow condition at issue. As the agency that administers the CWA, EPA's interpretation of the statute's provisions are entitled to deference by this Court. *Chevron, USA v. NRDC*, 467 U.S. 837, 844 (1984).

(overturning state issuance of § 401 certificate based on insufficient evidence that conditions in the certification would ensure compliance with "applicable water quality standards, the non-degradation requirements of the Water Quality Act and the public policy of the state to protect fish and wildlife").

The only cases which support Petitioners are a line of New York cases starting with *de Rham v. Diamond*, *supra*. In *de Rham*, the New York Court of Appeals held that only water quality standards could be considered in issuing or denying a § 401 certificate. This reasoning has been followed in a long line of New York cases. The *de Rham* decision is hardly surprising considering that the *de Rham* court was interpreting § 21(b) of the Water Quality Improvement Act of 1970. As explained, that provision expressly limited a state to assuring compliance with state water quality standards. Thus, the *de Rham* decision was appropriate given the statutory provision it was interpreting.

The courts following *de Rham* have failed to recognize that § 401 replaced § 21(b) in 1972 and considerably expanded state authority. Most importantly, the New York courts have failed to recognize the addition of the "other appropriate requirement of state law" provision in 1972. In short, the New York cases, which limit a state to considering water quality standards in conditioning a § 401 certificate, are incorrectly decided.

In conclusion, the decision below properly interprets the "other appropriate requirement of state law" provision of § 401(d). The Washington Supreme Court's conclusions are mandated by the terms of § 401(d) and its legislative history, and is supported by the more persuasive judicial interpretations of the statute.

2. The Decision Below Is Consistent With The FPA's Licensing Scheme. The Petitioners argue that the decision below undermines the regulatory framework set forth in the FPA for hydroelectric projects,¹⁹ and will eliminate the balancing of interests that FERC engages in under the FPA. Nothing could be further from the truth.

Under the decision below, FERC will continue to implement the comprehensive system of regulation that Congress has crafted, and will certainly engage in the balancing of interests envisioned by the FPA when issuing licenses for hydroelectric projects. The decision simply recognizes the fact that Congress has authorized states to regulate the water quality impacts of hydroelectric projects.²⁰ As the court below stated: "The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority." (App. 19a.)

Petitioners argue that the decision below is inconsistent with this Court's ruling in *California v. FERC*, 495 U.S. 490 (1990). In the *California* case, the state issued a regulatory order to the operator of a hydroelectric

¹⁹ Petitioners argue that the FPA licensing scheme is comprehensive, if not exclusive, in nature. Hydroelectric projects, however, must comply with a number of regulatory schemes in addition to the one created by § 401 of the CWA. One example is the CWA's § 404 permit requirement administered by the Army Corps of Engineers. 33 U.S.C. § 1344. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987); another example is § 4(e) of the FPA itself which requires hydropower licensees to comply with requirements imposed by federal land management agencies. 16 U.S.C. § 797(c). See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

²⁰ It is important to note that Congress expressly recognized that it was ceding authority over the water quality impacts of hydroelectric projects to the states when it enacted § 401. S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in 1972 U.S.C.C.A.N. 3735.

project requiring a minimum instream flow. The state order was issued pursuant to state law, not § 401. Moreover, the order was issued some four years after FERC issued an FPA license for the project. The flow required by the state directly conflicted with a minimum flow prescribed by FERC in the license. This conflict led to this Court's ruling that the state requirement was preempted by federal law.

California v. FERC is a very different case than the case at bar. Most importantly, *California v. FERC* did not involve § 401 of the CWA. Rather, the state in that case was acting pursuant to state law only. Furthermore, there was an actual conflict between state and federal requirements in that case. There is no such conflict in this case. In sum, *California v. FERC* has little to do with this case, and Petitioners' arguments to the contrary are without merit.

In summary, there is nothing in the decision below that undermines the FPA, the 1986 Amendments to the FPA,²¹ or the consultation process set forth in § 10(j) (16 U.S.C. § 803(j)) of the FPA. In fact, we agree with the Petitioners that state authority under § 401 is quite limited. Water quality is the only area Congress delegated to the states under § 401. In contrast to the state's limited decision-making authority under § 401, Congress has granted authority to FERC to address a huge range of issues raised by hydroelectric projects. It is FERC's role to consider issues ranging from power concerns to cost to socio-economic impacts. It is also FERC's role to

²¹ These amendments are referred to as the Electrical Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 ("ECPA"). The legislative history of ECPA expressly states that the amendments do not affect or amend "any environmental law." H.R. Rep. No. 507, 99th Cong., 2d Sess. 21 (1986), reprinted in 1986 U.S.C.C.A.N. 2508.

consider a project's environmental impacts. See 16 U.S.C. §§ 797(e) and 803(a). However, Congress has given to the states the responsibility to protect water quality. The § 401 certificate is the vehicle by which this responsibility is implemented. After the state sets minimum requirements to protect water quality in the § 401 certificate, it is FERC's responsibility to implement the FPA's mandate. In this manner, the intent of Congress in enacting the FPA and the CWA is achieved.

The Petitioners paint an alarming picture which they allege will result from the decision below. They argue that the minimum flow condition required by Ecology renders the Elkhorn project infeasible,²² and that the decision below opens the door to the state of Washington and other states to shut down hydroelectric projects.

With regard to the Elkhorn project, the state has repeatedly demonstrated a most reasonable approach to regulating the water quality impacts of the project. To begin with, Ecology and other state, federal, and tribal experts worked with Petitioners for three years in an attempt to reach a consensus on a minimum flow. Only when that attempt failed did Ecology issue the § 401 certificate requiring the minimum flow: a flow which the state determined necessary to protect dwindling stocks of salmon and Steelhead, and, just as importantly, to ensure the Elkhorn project's compliance with state law. Simply put, the minimum flow is based on credible scientific data and is required by clear and objective requirements of state water quality laws. Water quality requirements, like the minimum flow condition in this case, will not, as

²² Petitioners make a totally unsupported argument before this Court that the minimum flow required by Ecology renders the Elkhorn project economically infeasible. Petitioners have never produced any evidence to substantiate this allegation despite an opportunity to do so before the PCHB.

Petitioners argue, "destroy the effectiveness of the FPA." Rather, they will ensure that hydroelectric projects will not cause legally prohibited degradation of the Nation's waters.

It is probable that this Court will one day be presented with a case which requires it to define the limits of authority granted to states under § 401 of the CWA and to define the appropriate relationship between § 401 and the FPA. This, however, is not that case. The minimum flow required by the state is clearly related to water quality; in fact is required by the state's water quality standards. As such, the minimum flow condition is within the scope of § 401, and is completely consistent with the regulatory framework applicable to hydroelectric projects that Congress has enacted.

IV. CONCLUSION

For all of the foregoing reasons, the state of Washington urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

THE SUPREME COURT OF WASHINGTON

No. 58272-6

Thurston County No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 of JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

MANDATE

THE STATE OF WASHINGTON TO: The Superior
Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 1, 1993, became the decision terminating review of this court in the above entitled cause on April 21, 1993. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

[SEAL]

2a

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 3rd day of May, 1993.

/s/ C. J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

3a

APPENDIX B

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

No. 58272-6

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 of JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

EN BANC

Filed Apr. 1, 1993

GUY, J.—This case arises as a result of plans of the City of Tacoma and the Jefferson County Public Utility District 1 (hereinafter Tacoma) to build a hydroelectric facility on the Dosewallips River. Federal law requires Tacoma to obtain a certificate from the Washington State Department of Ecology (Ecology) before beginning construction. Ecology granted the certificate but conditioned it upon Tacoma maintaining a certain minimum streamflow in the affected portion of the river. Tacoma argues that federal law preempts Ecology from setting this streamflow requirement, and that Ecology acted outside its authority because the requirement was designed to enhance the Dosewallips fishery rather than preserve it. We hold that there is no federal preemption and that setting the streamflow requirement was within Ecology's authority.

I

Facts

The Dosewallips River is a glacial stream that originates in the eastern Olympic Mountains. It flows east through the Olympic National Park, a national wilderness area, national forest land, and then private land before it empties into Hood Canal. The river is in pristine condition and supports populations of salmon, steelhead, and trout.

In 1982, Tacoma began planning to construct a hydroelectric power plant on the Dosewallips River just outside the Olympic National Park near the Elkhorn Campground. The "Elkhorn project", as it is called, will divert water from the river, use that water to run turbines to generate electricity, then return the water to the river 1.2 miles downstream. This will result in a reduction in the streamflow in the "bypass reach", which is the length of river between the initial diversion and where the water is returned downstream.

Federal law requires that Tacoma obtain a license from the Federal Energy Regulatory Commission (FERC) before beginning construction. In addition, section 401 of the federal Clean Water Act (Act), 33 U.S.C. § 1341, requires as a part of the licensing process that Tacoma obtain a water quality certificate from the State of Washington.

Tacoma applied to Ecology for the section 401 certificate in 1983. As part of the section 401 application process, Tacoma conducted a 2-year study of the effect of the Elkhorn project on fish habitat in the Dosewallips bypass reach. This study was performed in consultation with Ecology and other agencies, including the Washington State Departments of Fisheries and Wildlife, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty

Council. At the conclusion of the study, Tacoma proposed to maintain minimum instream flows of between 65 cubic feet per second (cfs) and 155 cfs, depending on the month. Ecology eventually issued the section 401 certificate, but conditioned it upon Tacoma maintaining instream flows of between 100 cfs and 200 cfs.

Tacoma appealed Ecology's instream flows requirement to the Pollution Control Hearings Board (Board). The Board ruled that Ecology acted within its authority in placing base flow conditions within the section 401 certificate in order to preserve the Dosewallips fishery resource. The Board then held another hearing to consider Tacoma's argument that Ecology exceeded its authority because its flow regime for the Dosewallips was designed to enhance rather than merely preserve the fishery. Two of the three Board members agreed with Tacoma's argument and so reversed the flow rates set by Ecology. The third Board member dissented on the basis that Ecology's flow rates would not enhance the fishery.

The parties cross-appealed to the Thurston County Superior Court, which ruled that Ecology is not preempted from setting minimum streamflows, that the Board erred in finding Ecology's flows would enhance the Dosewallips fishery, and that in any case Ecology has the authority to require such an enhancement. The trial court therefore reinstated Ecology's streamflow rates. We granted Tacoma's motion for direct review.

II

Ecology's Authorization under the Clean Water Act

Tacoma argues that the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.*, preempts Ecology from conditioning a section 401 certificate upon the maintenance of a minimum streamflow. Ecology contends the preemption doctrine does not apply because it was acting

under the authority granted to it by the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

We begin by addressing whether the Clean Water Act authorized Ecology to include base flow requirements in the section 401 certificate it issued to Tacoma. We conclude that it did.

A

State Water Quality Standards

Section 401 of the Clean Water Act generally requires any applicant for a federal license to obtain a state water quality certificate if the applicant's operations may result in a discharge into a waterway. 33 U.S.C. § 1341. The parties agree that Tacoma was required to obtain a 401 certificate from Ecology. The controlling provision here of section 401 is subsection (d), which provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title [section 301 or 302 of the Act], standard of performance under section 1316 of this title [section 306 of the Act], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [section 307 of the Act], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d). Thus, under section 401(d), the state is required to include whatever conditions are "necessary to assure" compliance with specific provisions of the Act, as well as with "any other appropriate re-

quirement of State law". The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate. Ecology contends that the stream-flow conditions in the 401 certificate issued to Tacoma were necessary to assure compliance with Washington's water quality standards. We agree.

The stated purposes of Washington's water quality standards include the goal of establishing such standards as are "consistent with public health and public enjoyment thereof, and the *propagation and protection of fish, shellfish, and wildlife*". (Italics ours.) WAC 173-201-010. This purpose is consistent with the Environmental Protection Agency's (EPA) declaration that state water quality standards "should, wherever attainable, provide water quality for the protection and propagation of fish." 40 C.F.R. § 130.3 (1991). The standards define an antidegradation policy for the state's waters, as required under federal regulations. WAC 173-201-035(8) (implementing 40 C.F.R. § 131.12(a) (1991)). That policy includes the principle that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a). The Dosewallips River is specifically identified as a "Class AA" river. WAC 173-201-080(12). The characteristic uses of a Class AA river include "fish migration, rearing, spawning, and harvesting." WAC 173-201-045(1)(b)(iii).

In short, section 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dose-

wallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

We also note that the concept of pollution in the Clean Water Act is extremely broad. Section 502(19) of the Act, 33 U.S.C. § 1362(19), reads: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Under this broad definition, man-induced alteration of streamflow level is "pollution". We further note a letter written by an EPA assistant administrator to the Secretary of FERC. The letter takes issue with an assertion in a FERC report that conditions related to fish, wildlife, vegetation, and recreation are inappropriate in section 401 certificates needed to obtain licenses from FERC. The letter states:

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include . . . the diversity and composition of the aquatic species . . . [and] habitat loss . . .

Brief of Respondent, at 94 (letter from LaJuana Wilcher, Assistant Administrator of the EPA, to the Honorable Lois D. Cashell, Secretary of FERC).

Finally, other states also have water quality standards that make reference to fish and wildlife concerns, and such concerns have been held properly to require instream flow conditions in section 401 certificates. For example, in *Bangor Hydro-Elec. Co. v. Board of Envtl. Protec.*,

595 A.2d 438 (Me. 1991), a section 401 certificate applicant argued that the Maine Board of Environmental Protection had exceeded its authority in asking for information about the project's effect upon fish habitat. The Maine Supreme Court rejected this argument and explained that under Maine's water quality standards, the "designated uses" of the affected river included fish habitat. The court stated that because these designated uses are an integral part of the state water quality standards, the Board's information request was proper. 595 A.2d at 443. Similarly, in *Hi-Line Sportsmen Club v. Milk River Irrig. Dists.*, 241 Mont. 182, 786 P.2d 13 (1990), the Montana Board of Health and Environmental Sciences issued a section 401 certificate for the construction and operation of a "siphon scheme" at a hydroelectric dam that would have raised the water temperature in the effected river. The court upheld the district court ruling that the record failed to show the project would not violate state water quality standards, which included provisions regarding the use of the river for fish habitat. 241 Mont. at 187-88. *See also Georgia-Pacific Corp. v. Vermont Dep't of Envtl. Conservation*, 35 Env't Rep. (BNA) 2046 (Vt. Super. Ct. Oct. 4, 1991), *aff'd*, 35 Env't Rep. (BNA) 2052 (Vt. Sup. Ct. Sept. 14, 1992) (water quality standards recognized as appropriately concerning aesthetics, recreation, and wildlife).

Tacoma argues that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. It is true that the standards include provisions regarding pollution discharges. *See e.g.*, WAC 173-201-045(1)(c)(vii) (criteria for concentrations of toxic, radioactive, and deleterious materials in Class AA waters). However, as explained above, the standards' explicitly-stated antidegradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the standards' broad purpose, all demonstrate

a broad concern for water quality, not just with pollution discharges. See *Bangor Hydro-Elec. Co. v. Board of Env'tl. Protec.*, *supra* (water quality standards would be a nullity if state could not consider designated uses).

B

Section 401's Integration of

"Any other Appropriate Requirement of State Law"

Ecology also maintains that the streamflow condition it imposed in Tacoma's section 401 certificate was an appropriate measure to carry out RCW 90.54.020(3)(a), which provides that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Tacoma, joined by a group of utilities acting as amicus curiae, argues that the phrase "any other appropriate requirement of State law" refers only to state water quality standards. The Board ruled that the phrase refers to all state water quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act, 33 U.S.C. § 1313, and that Ecology's streamflow conditions were necessary to assure compliance with RCW 90.54.020(3)(a). We agree with the Board's interpretation.

We are required to interpret the words of a statute in accordance with their usual and ordinary meaning. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). The phrase "any other appropriate requirement of State law" contains no language to suggest its reference should be limited only to state water quality standards. Its meaning is not restricted to specific statutory or regulatory provisions, but only to those requirements of state law that are "appropriate".

The phrase's context within the Clean Water Act offers guidance as to its meaning. Most generally, Congress's broad purpose in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). This broad purpose suggests that what state laws qualify as "appropriate" for purposes of section 401(d) should also be understood broadly. In addition, section 401(d) expressly lists sections 301, 302, 306, and 307 of the Act as sources for the limitations in section 401 certificates. Thus, where Congress intended to refer to a specific provision, it did so. In contrast, section 303 (33 U.S.C. § 1313)—the section requiring states to adopt water quality standards—is *not* listed in section 401. If Congress intended to refer only to state water quality standards, it could have specifically referred to them. That Congress did not do so is evidence that it intended the phrase "any other appropriate requirement of State law" to refer broadly to all state water quality-related laws, not just to state water quality standards adopted pursuant to section 303.

The scope of "any other appropriate requirement of State law" was directly addressed in *Arnold Irrig. Dist. v. Department of Env'tl. Quality*, 79 Or. App. 136, 717 P.2d 1274, *review denied* 301 Or. 765 (1986). There, the Oregon Department of Environmental Quality had denied a request for a section 401 certificate on the ground that the applicants failed to provide a statement that the hydroelectric project was compatible with the country's comprehensive plan and land use ordinances. The applicants objected, saying that only water quality standards could be considered. The court rejected this on the basis explained above: if Congress had intended to make the section 303 standards the exclusive water quality criteria states may use in placing limitations in section 401 certificates, then Congress could have specifically mentioned those standards in section 401(d). 79 Or. App. at 142. The court therefore held that any

water quality related state law qualifies as an "appropriate requirement of State law" for purposes of section 401(d). 79 Or. App. at 142. *See also Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976) (holding section 401(d) allows state to condition certification upon compliance with any requirement the state deems appropriate under state law). *But see Niagara Mohawk Power Corp. v. New York Dep't of Env'l Conservation*, — A.D.2d —, 992 N.Y.S.2d 141 (1993) (interpreting phrase within Clean Water Act in light of Congress's presumed intent in enacting FPA amendments).

The legislative history of section 401(d) further supports this interpretation. In particular, the differing treatment Congress gave sections 401(a) and 401(d) in a 1977 amendment is revealing. Generally, section 401(a) identifies specific provisions of the Clean Water Act and provides that noncompliance with any of those provisions enables a state to deny certification; section 401(d) confers authority on states to condition certification. As originally enacted in 1972 as part of the Federal Water Pollution Control Act Amendments (FWPCA), section 401(a) did not list section 303. Pub. L. No. 92-300, § 2, 86 Stat. 816, 877.79 (1972). Five years later, when Congress substantially supplemented the FWPCA by enacting the Clean Water Act, Congress amended section 401(a) to include reference to section 303. Pub. L. No. 95-217, § 64, 91 Stat. 1566, 1599 (1977). A Senate report submitted at the time explained that the purpose of the amendment was to follow the original congressional intent and to clarify that consideration of state water quality standards was part of the certification process under section 401(a). S. Rep. No. 370, 95th Cong., 1st Sess. 72-73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4397-398. In so amending section 401(a), however, Congress failed to amend section 401(d) in the same way. As two commentators writing on this subject have explained,

[b]ecause of this omission, it seems clear that Congress did not mean to restrict conditions on certifications only to those necessary to assure compliance with section 303 water quality standards. Rather, Congress recognized a difference between the authority it provided in section 401(a)(1) to *deny* certification and that which it conferred in section 401(d) to *condition* certification. *It intended that the broader power contained in section 401(d) would allow the states to condition certification on compliance with state law provisions other than water quality standards adopted pursuant to section 303.*

(Some italics ours.) Ransel & Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 Va. J. of Nat. Resources L. 339, 355 (1988).

We conclude that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates. 79 Or. App. at 142.

We hold that the streamflow conditions Ecology included in the 401 certificate it issued to Tacoma were an appropriate measure to assure compliance with Washington's water quality standards. We also hold that a section 401 water quality certificate may include conditions to enforce all state water quality-related statutes and rules, including but not limited to, state water quality standards. Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and base flow, we further hold that RCW 90.54.020(3) (a) qualifies as an "appropriate requirement of State law" for purposes of section 401(d), and therefore that Ecology's base flow limitation in the 401 certificate was

an appropriate measure to assure compliance with RCW 90.54.020(3)(a) as well as the water quality standards.

III

Federal Preemption

Having concluded that RCW 90.54.020(3)(a) and Washington's water quality standards authorize Ecology to impose streamflow conditions in section 401 certificates, we next consider Tacoma's contention that the FPA preempts Ecology's action. We reject Tacoma's preemption argument.

A.

The Threshold Requirement of State Action

The doctrine of federal preemption is based on the supremacy clause of the United States Constitution, U.S. Const., art. 6, cl. 2. Application of the doctrine presupposes as a threshold requirement some state action to be preempted by federal law. *See generally* L. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988). Here, several factors persuade us that Ecology's action in imposing a base flow condition in the 401 certificate lacks the character of state action required for federal preemption to apply.

First, a section 401 certificate is a federal permit required under the Clean Water Act, 33 U.S.C. § 1341, and in issuing this federal certificate, the state is required to set forth certain limitations. To the extent that the state's role is mandatory in these ways, the state cannot be said to be acting independently of the federal government.

Second, the sources of the streamflow limitation at issue here are state laws integrated into the Clean Water Act. In particular, Ecology's action was appropriate to assure compliance with RCW 90.54.020(3)(a) and Washington's water quality standards, which are inte-

grated into the Act as "appropriate requirement[s] of State law" under section 401(d).

Third, federal involvement in the development of state water quality standards is extensive. Those standards are required under the Clean Water Act, 33 U.S.C. § 1313. The Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval. 33 U.S.C. § 1313. After the EPA approves the state's submitted standards, they become the water quality standards for the state. 33 U.S.C. § 1313(c)(3). Washington's water quality standards, in particular, have been duly adopted by the state and approved by the EPA. 50 Fed. Reg. 29,761 (1983) (noting EPA's approval of Washington's water quality standards). If a state fails to submit standards to the EPA, or if the standards it does submit are inconsistent with the Act, the EPA promulgates its own standards for the state. 33 U.S.C. § 1313(c)(4); *see also* 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (proposed rulemaking by EPA to bring Washington's water quality standards into compliance with section 303(c)(2)(B) of the Act). This statutory framework gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them before they actually become the state's water quality standards. Indeed, in *Arkansas v. Oklahoma*, 503 U.S. —, 117 L. Ed. 2d 239, 257, 112 S. Ct. 1046 (1992), the Court declared that state water quality standards "are part of the federal law of water pollution control" at least insofar as they affect issuance of permits in other states. Similarly, the significant federal involvement in state water quality standards must be recognized when considering whether federal preemption applies to prevent a state from acting to assure compliance with them.

Finally, any conditions imposed in a 401 certificate become part of the federal license for which the certificate is required. Section 401(d) of the Act provides that any valid certification issued under section 401 "shall become a condition on any Federal license" for the activity in question. "FERC may not alter or reject conditions imposed by the states through section 401 certificates." *United States Dep't of the Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 548 (D.C. Cir. 1992). FERC itself has recognized that the terms and conditions included in a section 401 certificate "become terms and conditions of the license as a matter of law." [Apr.-June 1990 Transfer Binder] 51 Fed. Energy Reg. Comm'n (CCH) ¶ 61,268 at 61,343. Thus, the condition at the heart of the present controversy—the condition within the 401 certificate Ecology issued to Tacoma—will be, as a matter of law, a term of whatever hydroelectric operating license FERC eventually issues to Tacoma; as such, the condition will be a part of federal law.

By including base flow limitations in the section 401 certificate it issued to Tacoma, Ecology was acting to fulfill its obligations under federal law. The section 401 certificate must assure compliance with state laws integrated into the Clean Water Act. In particular, the certificate must assure compliance with water quality standards, which are regulations the content of which was substantially determined by the EPA and which assumed the status of state water quality standards only after the EPA gave its approval. Finally, the streamflow condition, as part of the 401 certificate, also becomes a term of the FERC license by operation of law and as such a part of federal law. These factors collectively demonstrate such a significant and pervasive federal involvement that Ecology's action cannot be fairly regarded as state action for purposes of the application of federal preemption. Simply put, federal preemption doctrine does not apply in a context where a state is acting to fulfill its

federally mandated role in the comprehensive federal scheme embodied in the Clean Water Act.

B

Preemption Doctrine

Even if the threshold requirement of state action were met, the well-established principles regarding federal preemption would not support finding preemption in the present case.

As we recently observed in *Inlandboatmen's Union of the Pac. v. Department of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823 (1992), there are two well-established ways in which federal law may preempt state law: field preemption and conflict preemption. Field preemption may arise from either an explicit or an implicit expression of Congress's intent. Absent explicit preemptive language, Congress's intent to supersede state law may be implied if

- (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority.

Inlandboatmen's Union, at 701. Conflict preemption may arise either when compliance with both federal and state laws is physically impossible, or when state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *Inlandboatmen's Union*, at 702.

In the case of either field or conflict preemption, the essential inquiry is congressional intent. *Wisconsin Pub.*

Intervenor v. Mortier, 501 U.S. —, 115 L. Ed. 2d 532, 542, 111 S. Ct. 2476 (1991). In addition, “[t]here is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption.” (Footnote omitted.) *Inlandboatmen’s Union*, at 702.

The basis for Tacoma’s preemption argument is the FPA, which empowers FERC to license projects designed to develop power from any stream or other body of water over which Congress has jurisdiction. 16 U.S.C. § 797(a). The FPA, as amended in 1986 by the Electric Consumers Protection Act, also directs that in issuing such licenses FERC must “give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” 16 U.S.C. § 797(e). Congress further declared that FERC may not issue a license unless it judges the project to be “best adapted to a comprehensive plan” advancing these competing values. 15 U.S.C. § 803(a). In order to ensure this, the FPA requires FERC to consider recommendations from state and federal agencies and Indian tribes. 16 U.S.C. § 803(a)(2). In addition, in order to protect, mitigate damages to, and enhance fish and wildlife, the FPA requires FERC to adopt the recommendations of state and federal fish and wildlife agencies unless FERC believes such recommendations are inconsistent with the purposes of the FPA or other applicable law. 16 U.S.C. § 803(j)(1). FERC may reject the recommendations of state or federal fish and wildlife agencies, but it must publish its findings for doing so and state in those findings that its own conditions will comply with the FPA’s standards regarding fish and wildlife protection. 16 U.S.C. § 803(j)(2).

Tacoma argues that the FPA’s comprehensive scheme of licensing hydropower projects preempts Ecology from

setting streamflows in the section 401 certificate. The existence of the Clean Water Act and the authority and obligations given to the states under it make this argument unpersuasive.

Considering first field preemption, there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their authority and fulfilling their obligations under the Clean Water Act. When the FPA and the Clean Water Act are considered together, the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority. Consequently there is no basis for finding field preemption here.

As regards conflict preemption, there is no actual conflict between Ecology’s action and the FPA. Compliance with Ecology’s streamflow condition and the FPA is physically possible, and fulfillment of that condition does not stand as an obstacle to the accomplishment and execution of Congress’s purposes. Indeed, exactly the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process. Moreover, finding conflict preemption under circumstances such as those presented here would have the effect of requiring Ecology to guess which elements of the 401 certificate might conflict with actions FERC might take at a later time, and then decline to condition the certificate based on this guess—in violation of Ecology’s mandate under the Act. We cannot believe Congress could have intended to create such an administrative nightmare.

To support its preemption argument, Tacoma relies on *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990). There, FERC issued a license for a hydroelectric project and, in doing so, set a streamflow requirement in order to protect the fish in the affected portion of the river. The California Water Resources Control Board (WRCB) later issued an order requiring the licenses to conform to a higher streamflow requirement. 495 U.S. at 496. The WRCB relied on section 27 of the FPA, which provides:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

FPA, § 27, 16 U.S.C. § 821. The Court rejected the WRCB's argument, and held that FERC's powers as granted under the FPA preempted the WRCB's attempt to set its own streamflow requirements. The Court explained that under the FPA, FERC's power is exclusive unless some power is explicitly reserved for the states, and that section 27's reservation of power does not include the power to set instream flows. According to the Court, the words of section 27 "are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." 495 U.S. at 498 (quoting *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906 (1946)).

Tacoma argues that Ecology is trying to do precisely what the WRCB was attempting to do in *California v. Federal Energy Regulatory Comm'n*, namely, set a minimum instream flow rate for a federally licensed power

project, and therefore Ecology is no less preempted by the FPA than was the WRCB.

The present case is distinguishable from *California v. Federal Energy Regulatory Comm'n* on two grounds. First, in *California v. Federal Energy Regulatory Comm'n*, there was an actual conflict between the federal and state governments. FERC and the California WRCB had both issued orders regarding streamflow, and those orders were in conflict. No such conflict exists in the present case. Second, in *California v. Federal Energy Regulatory Comm'n*, the Clean Water Act was not at issue or even mentioned. The issue was the scope of what powers had been saved to the states under section 27 of the FPA. The authority for California's action was not derived from federal law. Here, the issue is whether the FPA somehow precludes Ecology from exercising the authority granted it, and the responsibilities delegated to it, under the Clean Water Act. The way in which the Clean Water Act is implicated in the present case completely alters the legal context and renders untenable Tacoma's preemption argument. The presumption against finding preemption in ambiguous cases further strengthens this conclusion. See *Inlandboatmen's Union*, 119 Wn.2d at 702.

In short, whereas *California v. Federal Energy Regulatory Comm'n* presented a straightforward case of a state acting on its own authority, the present case is one in which Ecology derives authority for its action directly from federal law. State law and state action are involved only to the extent they are integrated into the Clean Water Act. Our interpretation of Ecology's duties under the Act, therefore, does not conflict with the United States Supreme Court's interpretation of the scope of the power reserved to the states under section 27 of the FPA.

We conclude that Tacoma has not carried its burden of establishing federal preemption.

IV

The Enhancement Issue

We next consider the Board's finding that Ecology's streamflow condition for the Elkhorn project enhances the fishery in the Dosewallip River. The trial court ruled that this was error. We agree.

A

Factual Background

To understand the Board's factual ruling regarding enhancement, it is necessary to review the nature of the study conducted to determine the instream flow. After Tacoma filed its initial application with Ecology for the section 401 certificate, Ecology asked Tacoma to conduct a study to determine what level of water should be maintained in the bypass reach in order to preserve adequate habitat for fish. Ecology also requested that Tacoma perform this study using a method known as "instream flow incremental methodology", or "IFIM". Generally, the IFIM process first involves collecting data about water velocity and depth, the substrate of the river, what species of fish inhabit the river, and what developmental stages the fish go through at what times of year. The data are then assembled to enable predictions about how the water depth and velocity will change at different flow levels, and to show what depths, velocities, and substrates are most suitable for each life stage of each fish species in the river. A computer program known as "PHABSIM" (for physical habitat simulator) is then run using this assembly of data. The output of the PHABSIM program includes a set of charts or tables. Each chart or table indicates for a given fish species and a given life stage of that species the "weighted usable area" available at different flow levels. "Weighted usable area", roughly, is how much area of the river the fish can use as habitat.¹ These are then used by fisheries

¹ More specifically, "[w]eighted usable area is an index computed by multiplying the surface area of a portion of a stream by a

biologists to determine the appropriate instream flows for the river.

In the present case, Tacoma and Ecology worked together in producing the results of the IFIM study, but then disagreed as to the appropriate instream flows. Tacoma claims that fish production will be preserved using the flow regime it has proposed, but that the flow regime Ecology imposed in the section 401 certificate would actually enhance fish production. The Board agreed with Tacoma. In its findings of fact, the trial court found the Board's conclusion to be clearly erroneous.

B

Standard of Review

The Board is one of four administrative boards comprising the environmental hearings office, which is created by RCW 43.21B.005. The members of the Board are appointed by the Governor with the advice and consent of the Senate. RCW 43.21B.020. When a Board decision is rendered pursuant to a formal hearing, as was the case here, judicial review is conducted pursuant to the Administrative Procedure Act, RCW 34.04 or RCW 34.05. (Because the present case was initiated prior to July 1, 1989, RCW 34.04 applies. RCW 34.05.902.) Under RCW 34.04.130(6)(a), the court may reverse an agency's determination if it was "clearly erroneous in view of the entire record". A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed. *Cougar Mt. Assocs. v. King Cy.*, 111 Wn.2d 742,

weighting factor that describes the suitability of the stream for the organism of interest. It displays the surface area of stream in square feet of optimal habitat per 1,000 linear feet of stream." Cavendish & Duncan, *Use of the Instream Flow Incremental Methodology: A Tool for Negotiation*, 6 Env't Impact Assessment Rev. 347, 349 (1986).

747, 765 P.2d 264 (1988). Thus, the proper standard of review for the trial court to have used in evaluating the Board's factual determination was the clearly erroneous standard.

Furthermore, this court has stated that "[u]pon appeal from a superior court's application of the 'clearly erroneous' standard, the appellate court applies the same standard directly to the administrative decision." *Department of Ecology v. Ballard Elks Lodge* 827, 84 Wn.2d 551, 555, 527 P.2d 1121 (1974). Therefore, in the present case we apply the clearly erroneous standard directly to the Board's decision. *Cf. Schub v. Department of Ecology*, 100 Wn.2d 180, 183-84, 667 P.2d 64 (1983) (applying clearly erroneous standard directly to agency's determination rather than board's).

Finally, it is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency. *E.g., Schub*, 100 Wn.2d at 167. Here, Ecology was exercising its expertise in judging the appropriate instream flow rate for the Elkhorn project. Therefore, in analyzing the Board's decision under the clearly erroneous standard, we also give due deference to Ecology's expertise in this area.

C

The Board's Assessment of Ecology's Preservation Flow

At the hearing before the Board, there was testimony from six fisheries biologists representing five different states and federal agencies. These biologists were all involved in the IFIM study and in Ecology's setting of instream flow rates for the Dosewallips. Each expert testified that his or her intent in setting the flow rates, or the intent of the agency represented, was to preserve and protect the fishery in the Dosewallips, not to enhance

it.² In light of this testimony, it is manifestly unreasonable to believe that the agencies *intentionally* sought to enhance the Dosewallips fishery. Moreover, these experts also testified that in their opinions Ecology's flows would not in fact enhance the Dosewallips fishery. The one expert who testified for Tacoma, Phillip Hilgart, said that he could not tell whether Ecology's flow would enhance the fishery.

In light of this unrefuted testimony, the Board's conclusion that Ecology's flows would enhance the Dosewallips fishery is questionable. Apparently the Board assumed that spawning habitat is the limiting factor in fish production and then reasoned that Ecology's flow will increase fish production because it will provide more spawning habitat than is available under natural conditions. We find persuasive Ecology's position, shared by the trial court as well as the dissenting member of the 3-person Board, that this reasoning is erroneous.

First, the Board appears not to have adequately considered the uncertainty inherent in the computer modeling of the complex biological systems of the river. For example, the PHABSIM model uses only three of the many variables that determine fish habitat. The three variables PHABSIM uses are water depth, water velocity, and substrate. There was testimony before the Board, however, that there are other important flow-related habi-

² *E.g.*, testimony of Hal Beecher, Department of Wildlife fisheries biologist, Transcript of Proceedings (Dec. 15, 1987), at 167; testimony of Kenneth Bruya, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 138-39; testimony of Brad Caldwell, Department of Ecology fisheries biologist, Transcript of Proceedings (Dec. 16, 1987), at 104; testimony of Jean Caldwell, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 48; testimony of Stephen Ralph, Point No Point Treaty Council fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 110; testimony of Elaine Rybak, United States Fish & Wildlife Service fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 98.

tat variables, including (1) predation, (2) competition and territoriality, (3) sedimentation and its effect on eggs and food supplies, (4) the adequacy of flows to prevent eggs from dehydrating, and (5) the creation of barriers to migration. Because PHABSIM's predictions regarding fish habitat are based on this artificial concept of habitat, Ecology's biologists were conservative in their estimation of the flows that would best protect the fishery, and there was no evidence that the flows would in fact enhance the fishery.

The Board also ignored the fact that one of the three habitat variables the PHABSIM model uses was incomplete. In particular, the PHABSIM model is designed for three measurements regarding water velocity. Because of the difficulties in getting measurements for the Dosewallips, however, only one measurement was used in the IFIM study conducted here. This further underscores the appropriateness of Ecology's conservative approach to setting minimum instream flows.

Furthermore, the Board assumed that the amount of fish habitat available under natural conditions can be reliably measured by reference to the river's "50 percent exceedence flow." The 50 percent exceedence flow for a river is that level of flow at which half the daily flows during a 1-month period are lower and half the daily flows are higher. The testimony was that for a river like the Dosewallips, the flow of which changes constantly and dramatically, the 50 percent exceedence flow may be meaningless as a measure of normal conditions. In her dissent, Board member Bendor points out that in 1 month, 210 cfs was the 50 percent exceedence flow whereas 800 cfs was the average flow.

The Board also erroneously assumed that because the computer model maximizes for an "optimum" flow regime for fish, this means that overall fish production will be increased. The record before us indicates that FHABSIM optimizes a flow regime only in the sense that for a given

species and a given life stage of that species, the model predicts at what flow the largest amount of weighted usable area of habitat will be present. Even on the sanguine assumption that maximizing weighted usable area is "optimum" for that life stage of that species, the same flow regime may not be optimum for other life stages of the same species or for other species.

Finally, the Board overlooked the uncertainty in the assumption that the limiting factor in fish production in the Dosewallips is spawning habitat. There was expert testimony, including testimony from Tacoma's expert witness Phillip Hilgert, that it is uncertain whether fish productivity in the bypass reach is spawning limited. The testimony regarding this assumption was at best equivocal. Mr. Hilgert at one point testified that "streams in Western Washington are *rearing* limited, and indeed much of the agencies' harvest management practice is based on the assumption of rearing limitations." (*Italics ours.*) Transcript of Proceedings (Dec. 16, 1987), at 33. Another expert testified he has never believed that the Dosewallips is spawning limited.

Our examination of the record leaves us with the firm and definite conviction that a mistake has been made. Ecology's intent was clearly to preserve, not to enhance, the fishery in the Dosewallips, and the Board's reasoning for its view that Ecology's flows would enhance the fishery is insupportable. Therefore we hold the Board's finding that Ecology's instream flow rates are an enhancement flow is clearly erroneous. Because we so hold, we need not reach the question whether Ecology has the authority to enhance the Dosewallips fishery by a base flow requirement in the section 401 certificate.

V

Conclusion

We hold that federal law does not preempt Ecology from including minimum streamflow conditions in Tacoma's section 401 certificate, and that the Board erred in finding that Ecology's flows would enhance the Dosewallips fishery. We therefore conclude that the section 401 permit is valid as originally issued by Ecology. The Superior Court is affirmed.

/s/ Guy, J.

WE CONCUR:

/s/ Andersen, C.J.

/s/ Durham, J.

/s/ Utter, J.

/s/ Smith, J.

/s/ Brachtenbach, J.

/s/ Johnson, J.

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,
Appellants,

v.

PUD No. 1 of JEFFERSON COUNTY
and CITY OF TACOMA,
Respondents.

PUD No. 1 of JEFFERSON COUNTY
and CITY OF TACOMA,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,
Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL JUDGMENT

[Filed Aug. 14, 1991]

This matter is an appeal of a decision of the Pollution Control Hearings Board (the Board or PCHB), PCHB No. 86-118. The PCHB conducted a full evidentiary hearing in this matter on December 15-18, 1988. In this proceeding, testimony was taken, and documentary evi-

dence was submitted. The PCHB issued its final decision on January 25, 1989.

The State Department of Ecology (respondent before the PCHB), and the State Departments of Fisheries and Wildlife (intervenors before the PCHB) appealed the decision of the PCHB to this Court on February 24, 1989. The City of Tacoma and PUD No. 1 of Jefferson County cross-appealed the PCHB's decision to this Court on March 1, 1989.

Appellant Department of Ecology has appeared in this matter by Jay J. Manning, Assistant Attorney General. Appellants Department of Fisheries and Department of Wildlife appeared by William C. Frymire, Assistant Attorney General. Cross-Appellants PUD No. 1 of Jefferson County and City of Tacoma appeared by Mark L. Bubenik, Assistant City Attorney, and Albert R. Malanca of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim for Tacoma.

This Court has reviewed the entire record produced before the PCHB, the file herein, including both parties' briefs, and has been presented with oral argument from all parties. On May 8, 1991, the Court issued a Memorandum Opinion. A copy of the Memorandum Opinion is attached as Exhibit 1 and is incorporated into this Final Judgment by this reference. Based on all of the foregoing, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

I.

The Court hereby adopts and accepts the PCHB's Findings of Fact I-VIII, and X. These Findings of Fact are set forth below for the convenience of the reader.

Finding of Fact I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

Finding of Fact II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

Finding of Fact III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "by-pass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

Finding of Fact IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE), must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020 (3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

Finding of Fact V

The base flows for the by-pass reach of the Dosewallips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

Finding of Fact VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent, both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

Finding of Fact VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

Finding of Fact VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable

area is an indicator of fish habitat and hence fish production.

Finding of Fact X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson, points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

II.

In Findings of Fact IX and XI, the PCHB found that the minimum flow regime required by the Department of Ecology in this matter is, in fact, an "enhancement" flow regime. In effect, the PCHB ruled that the minimum flow regime required by Ecology would in fact increase the amount of habitat available in the Dosewallips in the affected portion of the Dosewallips River and, consequently, fish production in the affected portion of the river.

In reaching this factual finding, the PCHB made a number of fundamental errors. First, the PCHB ignored the bulk of the evidence presented, most of it in the form of expert testimony presented on behalf of the respondent agencies, which supported the agencies' position that the Ecology minimum flow regime was just that, a *minimum* flow regime. This agency flow regime was designed and intended to protect and preserve the fishery resource in the affected portion of the river. The agencies neither intended nor did they in fact set a flow that would "enhance" fish habitat or fish production in the affected portion of the river.

Second, the PCHB mistakenly found a computer model's output (in the form of tables showing square feet of useable habitat at various flow levels) to be a true and accurate representation of actual fish habitat. As was explained repeatedly to the PCHB, the computer model's output, referred to as weighted useable area tables, is simply one indicator of the amount of physical habitat available which takes into account only three variables of habitat. The evidence presented to the PCHB strongly supports the agencies' position that weighted useable area is not the equivalent of habitat, but rather is only a crude indicator of the amount of habitat available.

In sum, after reviewing the entire record, this Court is left with a definite and firm conviction that the PCHB's factual finding that the agency flow regime is an enhancement flow regime is a mistake and is incorrect.

III.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, this Court now makes these

CONCLUSIONS OF LAW

The Court set forth its Conclusions of Law in the May 8, 1991, Memorandum Opinion. The Court hereby

incorporates that Memorandum Opinion, and in particular, the Conclusions of Law set forth therein.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Court enters the following:

JUDGMENT

The decision of the PCHB is affirmed in part and reversed in part. The PCHB's decision that the minimum flow condition required by Ecology in this matter is not preempted by federal law is hereby affirmed. The PCHB's decision that the Ecology-imposed minimum flow regime is an enhancement flow regime is hereby reversed. Finally, the PCHB's conclusion that RCW 90.54.020(3) does not allow an enhancement flow condition under the circumstances presented by this case is reversed.

DATED this 14th day of August, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

Presented by:

/s/ Jay J. Manning
JAY J. MANNING
Assistant Attorney General
Attorney for Dept. of Ecology

/s/ William C. Frymire
WILLIAM C. FRYMIRE
Assistant Attorney General
Attorney for Dept. of F & W

/s/ Mark L. Bubenik by Albert R. Malanca
MARK L. BUBENIK
Assistant City Attorney

36a

/s/ Albert R. Malanca
ALBERT R. MALANCA
Attorneys for City of Tacoma and
Jefferson County PUD No. 1

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APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Petitioners,

v.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Respondents.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Cross-Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Cross-Respondents.

MEMORANDUM OPINION

This matter came before the Court on cross appeals from the decision of the Pollution Control Hearings Board. The petitioners are seeking review of the Board's holding that federal law does not pre-empt the actions of the agencies, while the agencies seek review of the Board's holding that the flow levels established by the agencies

constitute an enhanced environment, and, thus, an ultra vires act.

The facts in this case are as follows. In 1982, the City of Tacoma and the PUD began planning to construct a hydroelectric project at the Elkhorn site on the Dosewallips River in Jefferson County. If approved, this project will be constructed along a 1.2 mile stretch of the Dosewallips outside the Olympic National Park. It is estimated that the project will divert up to 600 cubic feet per second (cfs). The species of fish that would be affected by the diversion are steelhead trout, and coho and chinook salmon.

To build this project, the City of Tacoma is required to obtain a license from the Federal Energy Regulatory Commission (FERC). FERC, as part of the license application process, required Tacoma to obtain a Water Quality Certificate from the Washington Department of Ecology.

In acting on the application for this certificate, the Department found that an Instream Flow, Incremental Method (IFIM) study would best assist in determining what part of the natural river flow should remain along the affected portion of the river in order to protect the fisheries presently in the river. Tacoma conducted an IFIM study during the period 1983 to 1985, and as a result of the study proposed a flow regime ranging from 65 cfs to 155 cfs, depending upon the month.

Several months later, the Department proposed its own flow regime, ranging from 100 to 200 cfs. In response, Tacoma proposed a revised flow regime ranging from 65 cfs to 170 cfs.

After considering these various proposals, the Department issued the water quality certification presently under appeal. This certification required that the minimum instream flow be maintained in accordance with the

flow regime proposed by the Department, ranging from 100 cfs to 200 cfs, depending on the month.

Tacoma appealed this decision to the Washington State Pollution Control Hearings Board. The Board held that the applicable federal statute did not preempt the Department's action in setting the minimum instream flows, but did hold that the levels set by the Department were designed to enhance the fishery, and, thus, exceeded the Department's statutory authority. The parties have cross appealed on these two issues.

I. Federal Preemption

In arguing preemption, Tacoma relies primarily on *California v. FERC*, — U.S. —, 110 S.Ct. 2024 (1990) for the proposition that FERC has superior authority to establish minimum stream flows than does the Washington Department of Ecology, while recognizing the existence of 33 U.S.C. § 1341(d), the provision relied on by the Department.

33 U.S.C. § 1341(d) provides as follows:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act [33 USCS § 1311 or 1312], standard of performance under section 306 of this Act [33 USCS § 1316], or prohibition, effluent standard, or pretreatment standard under section 307 of this Act [33 USCS § 1317], and with any other appropriate requirements of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (Emphasis added)

While 33 U.S.C. § 1341(d) would appear, at first reading, to permit state action to protect wildlife, *California*

v. *FERC's* holding that FERC preempts state action setting higher minimum stream flows than FERC must be examined.

California is a case where the facts are very similar to those found in the present case. The Rock Creek hydroelectric project was designed to draw water from the creek and then return it to the river slightly less than a mile away. The primary issue was who was permitted to set the minimum flow rate that must remain within the bypassed section of the creek. Initially, FERC issued a license in 1983, which set interim minimum flow rates after giving consideration to the economic feasibility and environmental effects of the project. These were set in a range of 11 cfs to 15 cfs. After study, the applicant recommended that these be adopted as the permanent rates, while the California Department of Fish and Game recommended significantly higher minimum flow rates.

In the meantime, in 1984, the state water permits were issued which set the interim minimum flow rates in conformity with the FERC rates, but reserved the right to impose higher permanent rates. In 1984 the state authority suggested that the permanent minimum flow rates should be in the range 30 cfs to 60 cfs.

Finally, after an administrative hearing FERC set the permanent minimum flow rate at 20 cfs throughout the year. Four days later the state board issued an order directing the applicant to maintain the flow rates in the range 30 cfs to 60 cfs.

The Supreme Court held that the California requirements for minimum in-stream flows cannot be given effect:

As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project

would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."

California, 110 S.Ct. at 2033.

Federal preemption of state law is governed by the intent of Congress.

Congressional intent to preempt state law may be found in three ways. First, Congress may express a clear intent to preempt state law. Second, the "scheme of federal regulation [may be] sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Third, preemption will be found when there is an actual conflict between federal and state law where (1) compliance with both the federal and state law is physically impossible, or (2) the state law is an 'obstacle' to the "full purposes and objectives of Congress."

In Washington, there is a strong presumption against finding preemption. Preemption may be found only if federal law "clearly evinces a congressional intent to preempt state law", or there is such a " 'direct and positive' " conflict "that the two acts cannot 'be reconciled or consistently stand together'."

Labor & Industries v. Common Carriers, 111 Wn.2d 586, 588, 762 P.2d 348 (1988) (citations omitted).

Under the facts of the *California* case, the key fact in the decision was the fact that FERC had issued its determination of what the minimum instream flow rate would be prior to the action by the California Water Board. Under 33 U.S.C. § 1341, California would properly be found to be preempted. Here, on the other hand, it has not been shown that FERC has made a decision on what the minimum instream flow rates should be. Under 33 U.S.C. § 1341 it is clearly recognized that consideration should be given of state standards. See also 16 U.S.C. § 803(j)(1). Therefore, up to the point when FERC has made its determination, Washington has authority to determine what it considers to be necessary minimum instream flow rates. Since Tacoma has not shown that FERC has acted, preemption will not be found. The decision of the Board on this issue will be affirmed.

II. Minimum Instream Flow Rates

Judicial review of this case is under RCW 34.04.130, in as much as it was commenced at the administrative level prior to July 1, 1989. RCW 34.05.902. Under RCW 34.04.130(6),

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority of jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the

act of the legislature authorizing the decision or order; or

(f) arbitrary or capricious

The Department asserts that the decision of the Board holding the flow rates proposed by the Department operated to enhance the existing fishery and were, thus, outside the Department's authority is either clearly erroneous or affected by other error of law.

A decision is clearly erroneous if, having reviewed the entire record and having considered the public policy behind the legislation, the court is left with the firm and definite conviction that a mistake has been committed. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 765 P.2d 264 (1988). This result follows even if there is some supporting evidence for the decision. *Johns v. Employment Security*, 38 Wn.App. 566, 686 P.2d 517 (1984).

On the other hand, in reviewing under the error of law standard, the court will conduct a de novo review and may substitute its judgment for that of the agency. *Inland Empire v. Utilities & Transportation*, 112 Wn.2d 278, 770 P.2d 624 (1989).

Here the primary issue raised by this case is whether the Board was clearly erroneous in finding that the Department's proposed flow rates will enhance the natural fisheries present in the bypass portion of the river. A secondary issue is whether a flow rate that may enhance the natural fishery constitute an ultra vires action, in that it does more than preserve the natural fishery?

With respect to the primary issue, I have reviewed the entire record in this matter, and have given consideration to the public policy behind the legislation and to the arguments of counsel. This record leaves me with a firm and definite conviction that the Board erred in finding that the flow rates proposed by the Department constitute

a rate of flow which will enhance the naturally existing fishery in the Dosewallips. Since the burden of proof was on Tacoma to prove that the Department's flow rates enhanced the fishery, its failure to prove that the Department's flows did more than preserve the potential habitat existing in the river and, in fact, enhanced the natural fishery requires that the Board's decision be reversed.

Having based my decision on the first issue, it is not necessary to examine the secondary issue. However, I conclude that the Board was incorrect in concluding that a flow rate that may result in an enhancement constitutes an ultra vires action.

The statute which gives rise to this issue is RCW 90.54.020(3), which provides that

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that the overriding considerations of the public interest will be served.

The Board concluded that the only base flows authorized by this statute are those "necessary to provide for the preservation of" fish, and that, since the base flows adopted by the Department enhanced the natural state of the river, these base flows exceeded the Department's authority. In so concluding, the Board limited the applicability of the prefatory phrase "and where possible, enhanced" to those situations where "paper water" existed, or where water rights had been abandoned in rivers which had been over-appropriated.

The Department argues that this portion of the statute is clear and unambiguous, should be given its plain and ordinary meaning, *State v. Theilken*, 102 Wn.2d 271, 684 P.2d 709 (1984), and that the conclusion of the Board limits the language of the Legislature in an unwarranted manner.

The Court must agree with the Department. While the situations suggested by the Board may be the most common situations when enhancement can occur, they are not the only situations. This river will have portions of its waters diverted. The question is to what degree. Since it is possible to fix a base flow that will enhance the fishery while still permitting development of the river, the Department correctly determined that it should fix a base flow that would optimize all varieties of fish in the river.

Dated this 8 day of May, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

APPENDIX E

**BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PCHB No. 86-118

IN THE MATTER of a Section 401 Water Quality Certification granted by Department of Ecology PUD No. 1 of Jefferson County and City of Tacoma

**PUD No. 1 OF JEFFERSON COUNTY, AND CITY OF
TACOMA, DEPARTMENT OF PUBLIC UTILITIES,**
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY
Respondent,
and

**STATE OF WASHINGTON DEPARTMENT OF WILDLIFE
DEPARTMENT OF FISHERIES**
Intervenors.

**REVISED FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

This matter is the appeal of base flows contained within a Water Quality Certification, granted by respondents with respect to a hydroelectric proposal by appellants.

The matter came before the Pollution Control Hearings Board, Wick Dufford, Chairman, Lawrence J. Faulk, Member, and Judith A. Bendor, Member. William A. Harrison, Administrative Appeals Judge presided.

The hearing was conducted at Lacey, Washington, on December 15, 16, 17 and 18, 1988.

Appellants appeared by Mark L. Bubenik, Assistant City Attorney for Tacoma. Respondent, State Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondent Intervenors State Departments of Wildlife and Fisheries appeared by William C. Frymire, Assistant Attorney General. Reporter, Gene Barker and Associates provided court reporting services. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined. Closing Briefs were filed on February 4, 1988. From testimony heard and exhibits examined, the Pollution Control Hearings Board issued a decision on June 29, 1988, with a dissent, following. The respondents filed a Petition for Reconsideration. Appellants filed a Memorandum in Opposition. A copy of the transcript was filed. Board Member Harold S. Zimmerman has reviewed the record. After reconsideration, the Board issues this revised decision:

FINDINGS OF FACT

I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "by-pass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE) must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020(3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

V

The base flows for the by-pass reach of the Dosewalips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent,

both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat and hence fish production.

IX

The respondents regard spawning as the limiting factor in fish production within the by-pass reach. The IFIM data show that when the natural, vigorous flow of river in the by-pass reach is decreased, spawning habitat actually improves. The base flows in this matter were set by selecting, in each month where spawning occurs, that flow¹ which produces 100% of the weighted usable

¹ The optimum fish flow adopted in this matter was deemed consistent, in testimony from the Department of Wildlife, with the following Department of Wildlife draft policy on instream flow:

Minimum instream flows are flows which maximize habitat for flow-dependent fish and wildlife; minimum flows are not less than optimum flows. Any reduction of flow below minimum instream flow reduces habitat. Additional flow above minimum instream flow does not increase habitat. Natural flows are sometimes less than minimum instream flow, but any prolonging of natural, subminimum instream flow will adversely impact fish and wildlife.

area using the IFIM data. This constitutes an optimum flow regime for fish where, as here, spawning is the factor limiting further fish production. Moreover, this also constitutes a flow regime which, for fish, is potentially superior to that provided by the natural flow of the Dose-walips River in the by-pass reach.

X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

XI

Tacoma has proposed base flows, using the same IFIM data, that were not accepted by DOE. Tacoma's proposed base flows were selected to equal or exceed the weighted useable area provided by the natural flow of the river for all life cycles of the fish species at issue. The existing, natural flow of the river was deemed by Tacoma to be the "50% exceedence flow" in the IFIM data. This

is the median daily flow meaning half the time daily flows are more and half the time daily flows are less. Tacoma's proposed base flows provide weighted usable area equaling or exceeding that provided by the existing natural flow as depicted by the 50% exceedence flow. A summary of pertinent flows is as follows:

Month	Existing (50% Exceedence flow) (CFS)	DOE Base Flow (CFS)	Tacoma's Proposed Base Flow (CFS)
Jan.	340	140	100
Feb.	302	100	75
March	325	200	145
April	408	200	130
May	689	200	105
June	738	200	105
July	448	200	90
Aug.	222	200	170
Sept.	159	150	150
Oct.	149	140	140
Nov.	285	140	95
Dec.	397	140	75*

Although additional data might present a more nearly representative picture, we find that the 50% exceedence flow is an appropriate indicator of the existing flow conditions in the river. Because reduction in flows improves fish habitat to a point where further reductions reverse the trend, the IFIM data shows that existing flow and Tacoma's proposed base flows have similar habitat value while DOE's base flow has habitat value greater than either. Respondents have not made any independent determination of existing fish habitat value in setting the DOE base flow.

* Initially proposed as 65 CFS this flow was the subject of testimony at hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

XII

Any Conclusion of Law deemed to be a Finding of Fact is here by adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Base flows in perennial rivers of the state are prescribed and authorized by the State Water Resources Act of 1971, Chapter 90.54 RCW. In pertinent part, that act provides at RCW 90.54.020 as follows:

90.54.020 General declaration of fundamentals for utilization and management of waters of the state

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) *Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state.* Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.* Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (*Emphasis Added.*)

II

Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree. In *Northwest Steelhead and Salmon Council, et al. v. State Department of Ecology, et. al.*, PCHB 81-148 (1983) we concluded that base flows represent a statutory allocation for the environment to be taken out before the maximum net benefits formula is applied. In that case, however, the base flows adopted by DOE were below the optimum for fish. We concluded that flows in excess of the base flow were subject to the maximum net benefits rule, thereby potentially including flows which would be the optimum for fish. We held that:

"The maximum net benefits requirement of the WRA [Water Resources Act] does not guarantee the optimum flows for fish, nor guarantee that existing fish habitat will be enhanced. Neither does it guarantee that all flows in excess of instream [base] flows shall be available for diversion. Rather, it calls for the balancing of competing, beneficial uses." *Northwest Steelhead, supra*, at Conclusion of Law IX, p. 16. [Brackets added.]

This balancing of competing, beneficial uses applies only to the marginal flow above the base flow, and not to the base flow itself. Yet if, as here, the optimum flow regime for fish is adopted as the base flow, that optimum fish flow is guaranteed without any portion of it being subjected to the maximum net benefits test. This is not consistent with DOE's earlier adoption of base flow in *Northwest Steelhead, supra*, nor with our holding therein.

Moreover, the adoption of optimum fish flows as base flow leaves barren the statutory admonition that water uses, which by RCW 90.54.020(1) includes fish maintenance and enhancement, shall be allocated under the maximum net benefit rule of RCW 90.54.020(2). While, as DOE urges, the maximum net benefit rule applies only to "potential" uses, that limitation would exclude only certain maintenance flows, such as those adopted by DOE as base flows in *Northwest Steelhead, supra*. By contrast, the optimum fish flows adopted in this case introduce the potential for enhanced fish use in competition with the potential hydroelectric use, while impermissibly dispensing with the statutory maximum net benefits test.

The optimum fish flows adopted as base flows by DOE in this matter are inconsistent with RCW 90.54.020(2) in that the incremental portion of these flows constituting fish habitat enhancement were not subjected to a maximum net benefit test.

III

The optimum fish flows adopted as base flows by DOE are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those "necessary to provide for preservation of" fish and related values. The term "preservation" is not specifically defined, nor ambiguous. Words in a statute should be given their ordinary meaning absent ambiguity or statutory definition. *Garrison v. State Nursing Board*, 87 Wm. 2d 195, 550 P. 2d 7 (1976). Dictionaries may be used to ascertain the common meaning of statutory language. *Garrison, supra*; *East v. King County*, 22 Wn. App. 247, 589 P2d 805 (1987). The term "preservation" means "the act of preserving" while the root word "preserve", means "to keep safe from injury, harm or destruction". *Webster's Third New International Dictionary*, 1974 (1971). The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows "keep safe" or preserve the fish habitat, rather than enhance it.

IV

Respondent, DOE, urges that it may enhance fish habitat through base flows because of the prefatory wording of RCW 90.54.020(3) which states:

The quality of the natural environment shall be *protected* and, *where possible, enhanced* as follows:
... (Emphasis added.)

The "preservation" language for base flows then follows at RCW 90.54.020(3)(a) as do the requirements for wastes proposed for entry into the water at RCW 90.54.020(3)(b). The prefatory wording provides that the environment shall be "protected" in all cases. The word

"protect" means "to cover or shield from that which would injure or destroy or detrimentally affect. *Webster's, supra*, 1822. Thus the term "protected" is kindred in meaning to the term "preservation" applicable to base flows. By contrast, the word "enhance" means "advance, elevate, augment, heighten or increase". *Webster's, supra*, 753. The key to understanding this prefatory wording is that while it uses the terms "protected" and "enhanced", which are distinguishable from one another, it provides for protection in all cases but provides for enhancement only "where possible".

Here it is noteworthy that the Water Resources Act of 1971, Chapter 90.54 RCW, was enacted relatively recently in the history of Washington water law. At the time of its enactment, many rivers and streams had long been subject to appropriations diverting their waters for various uses. Thus while the base flows were intended to "protect" all rivers, some were already over-appropriated to meager flow levels by 1971. In *Northwest Steelhead, supra*, summer flows in the Green River had been reduced by pre-1971 appropriations to low levels. In that matter, DOE adopted a base flow which exceeded the actual flow in the river at low summer levels. The amount by which base flow exceeds actual flow is sometimes referred to as "paper water" in recognition of the fact that it exists only on paper and not in real life. Yet the worthwhile object of establishing "paper water" is that when in the future, existing appropriators may abandon or forfeit their water rights the associated waters can be devoted to filling out the base flow, and thereby remain in the river. In this fashion the quality of a river already degraded by over-appropriation when the base flow legislation was enacted can be "enhanced" by base flows. This is the situation contemplated by the prefatory language in calling for enhancement "where possible". The matter at hand, however, is not that sit-

uation. Rather, the river at issue is flowing in its essentially natural state. Its fish producing potential may be preserved at this natural level through the adoption of base flows. But unlike a river degraded by over-appropriation, this river, in its natural state, may not be subjected to base flows calculated to enhance its natural productivity. Were that not the case, the phrase "where possible" used in connection with "enhanced" would be deprived of meaning along with the terms "protected" and "preservation". Base flows would then be wrongly understood to be enhancement flows in all instances.

We conclude that the base flows at issue enhance the fish producing potential of a river flowing in its essentially natural state, and are therefore inconsistent with RCW 90.54.020(3)(a) limiting base flows to those necessary "to provide for preservation" of fish.

V

Tacoma has shown that its proposed base flows (*see* Finding of Fact XI, above) will probably preserve the fish habitat and productivity now provided by the by-pass reach flowing in its natural state. These base flows therefore represent the correct application of RCW 90.54.020 (3)(a) to the facts of this case.

VI

Other matters than fish preservation made pertinent to base flows by RCW 90.48.020(3)(a) are not, in this case, sufficient to sustain the base flows adopted by DOE nor sufficient to justify base flows greater than those proposed by Tacoma.

VII

As we have concluded earlier, base flows are only a first step in determining the ultimate allocation of water between competing uses. Nothing herein precludes the ultimate allocation of flows greater than the base flow for fish enhancement. If respondents pursue such a course

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under state law, the maximum net benefits test of RCW 90.54.020(2) would apply to flows greater than base flows. If respondents pursue such a course under federal law in FERC proceedings, nothing herein is intended to indicate whether base flows are the maximum flows which ought to be allocated to fish productivity.

VIII

In reaching our conclusions in this case, we do not render any view as to whether state law should mandate, without consideration of other water uses, 1) enhancement flows to optimize fish productivity or 2) base flows necessary to preserve fish productivity. We hold only that the latter is all the state law now requires—leaving additional allocations for fish to a balancing process. Whether the law should be retained in its present form or changed is a broad question of policy properly addressed to the legislature.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The base flows within the water quality certification are hereby vacated. This matter is remanded for reissuance of the water quality certification in accordance with this decision.

DONE at Lacey, WA this 25th day of January, 1989.

POLLUTION CONTROL HEARINGS
BOARD

/s/ Wick Dufford
WICK DUFFORD
Chairman

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/s/ Harold S. Zimmerman
HAROLD S. ZIMMERMAN
Member

(Dissent)
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Law Judge

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,

Respondents.

REVISED DISSENTING OPINION

The Water Quality Certification issued by the Department of Ecology ("DOE") conforms to the requirements of state law to establish base flows and should be AFFIRMED. Therefore, I dissent.

— This is a simple case about what constitute adequate minimum monthly flows to preserve fish habitat in the Dosewallips River. The revised majority opinion places an insupportable reliance on a limited mathematical model, derived from only one wateryear, to determine habitat, and ignores a range of critical real-world habitat factors. Moreover, the opinion erroneously concludes that DOE's optimization of flows for *one* fish species at the spawning life stage constitutes "enhancement" of habitat for *all* fish. In light of all the evidence, the opinion effectively and improperly shifts the burden from appellants to prove that DOE's base flows are in error, onto respondent DOE to prove their base flows are correct.

In sum, the opinion is fatally flawed.

I

The Dosewallips is a river of unique beauty, with its headwaters flowing from the high glacial peaks of the eastern Olympic Mountains in the Olympic National Park. After flowing through the Park, and national forest and private lands, it empties into deep Hood Canal. The River is an important asset to the State of Washington, supporting wild and pen-reared runs of sea-run steelhead, as well as coho and chinook salmon in the upper portions, and pink and chum salmon in the lower, flatter reaches of the River. Parts of the upper River are steep, with cascades, deep plunge pools and riffles. Upstream, above the proposed project, there is an impassable waterfall preventing fish from migrating beyond. Because of the snow and glacial runoff, the River's flows fluctuate widely from month to month and from year to year.

Because the uppermost origins of the River are within the National Park, the River's water quality is significantly protected. This is a situation increasingly rare among the watersheds and waters of Washington State and specifically Hood Canal. The River is under study for possible inclusion in the Wild and Scenic Rivers List.

II

The proposed hydroelectric project consists of a diversion dam, a penstock (very large pipe), and a powerhouse. At the dam, 50 to 600 cubic feet per second ("cfs") of water from the River would be removed from a 1.2 mile stretch of the River, (between River Miles 13.8 and 12.6), in a fairly steep section known as the "bypass reach". The diverted water would flow through the penstock in a tunnel to the powerhouse where electricity would be generated.

The project does not include any storage capacity, so flows in excess of 600 cfs, the project's capacity, would

not be diverted and would remain in the River and complement any required base flows. Conversely, because of engineering constraints, when the River's flows are less than 50 cfs plus that month's required base flows, no removal of water would occur. However, at flows of 51 cfs plus base flows, all 50 cfs could be diverted, resulting in abrupt River flow changes during low flow periods.¹

The key disputed issue in this case is: what are the base flows that must be left in the River's bypass reach in order to preserve the fish?

III

DOE issued the Water Quality Certification allowing PUD No. 1 of Jefferson County and the City of Tacoma to withdraw from 50% to 90% of the River's flows, depending upon the month. By no stretch of the imagination can DOE's action, leaving in the River only 50% to 10% of the flows, be properly characterized as leaving the River in a wild state. In rebuttal, appellants propose to remove 95% of the River's flows in *all months* except September and October. (See Attachment One.)

IV

To determine what flows are required to satisfy the fish preservation base flow requirements of RCW 90.54.020(3)(a), both the DOE and appellants utilized, to varying degrees, a mathematical model known as PHABSIM (hereafter "model") in an effort to calculate fish habitat. The model is in the early developmental stages. The mathematical results were then interpreted by DOE using experts' professional judgment to derive

¹ Additional engineering constraints may limit such diversions, to avoid having to frequently turn the turbines on and off. However, no evidence has been presented further delineating such constraints.

base flow figures that preserve habitat. This total evaluation process is known as IFIM (hereafter "evaluation"). A basic assumption was made by all parties that preservation of habitat in fact preserved fish. Such assumption does not account for other non-flow related preservation factors, such as overfishing.

V

A stretch of the River within the bypass was chosen for PHABSIM modeling purposes. Only three physical variables were measured: water velocity, water level, and substrate (composition of the bottom). Only one set of river velocity speeds were measured and used in the model, rather than the customary three. The model then attempted to quantify habitat under different proposed flows, resulting in a number known as "weighted usable area" ("WUA"). These WUA numbers are intended to be *indicators* of habitat. Appellants' case consisted of only one witness, who conceded that the Dosewallips is "a very difficult stream" to model.

VI

The model has not been tested to determine its accuracy range or the magnitude of risk inherent. Moreover, the model cannot even compute habitat when flows exceed 600 cfs, which occurs regularly in the Dosewallips. In addition, for fish fry life stages, the model is very unreliable, attempting to dry-up the River.

The model did *not* include other important flow-related factors which are essential elements of habitat, including: predation, competition and territoriality, sedimentation and the effect on eggs and food supplies, the adequacy of flows to prevent eggs from dehydrating, and the creation of barriers to migration. A properly conducted determination of base flows for fish preservations must consider these other factors, even if the factors have not been

individually numerically quantified.² The model's numerical results must be cross-checked with real-life requirements. Unfortunately, the other opinion largely adopts these bare-bones numerical results "whole cloth".

VII

The Dosewallips River, as it currently flows undammed, provides excellent habitat for steelhead and salmon. The fish have evolutionarily adapted over the millenium to this River with its dynamic changes in flow. The following brief background on fish lifecycles provides a basis for understanding why different flows during the year are critical.

Sea-run steelhead enter the River in winter and early spring, spawning in the River in the spring. The eggs hatch and the fry and juveniles rear in the River for two years, whereupon they migrate downstream to rear in the ocean for about one and a half years before returning to spawn. Adult chinook salmon in the Dosewallips consist of spring and fall runs, with the former entering the River in April to June, staying in the River until they spawn in August-September. Fall run chinook enter in August through September and spawn in December. Their young stay in the River for about one year, before migrating to the ocean. Adult coho salmon enter the River as early as August to spawn, coincident with high flow events such as glacial runoff.

The eggs are laid in gravel in a minimum of six inches of water. With as little as 15 minutes exposure to air, eggs dry-out and de-water. This dehydration causes significant egg mortality.

² No party has done a quantitative baseline study for such factors. All parties concede such study would be very expensive, take many years to complete, and is not practical to do. Therefore, experts' judgments were used.

VIII

The type of habitat suitable for steelhead and salmon differs depending upon the particular life stage. Under natural conditions several life stages of fish exist in the River at the same time.

When issuing a Water Quality Certificate which allows diversion of a river's flow, given the variety of *concurrent* habitat demands, an expert determination has to be made as to *which life stage* is most flow-sensitive. That life stage is then "optimized" using the WUA habitat indicators.

All parties engaged in "optimization". DOE correctly used the spawning stages for such optimization.³ In contrast, where choices had to be made, appellants optimized for juvenile rearing.

IX

Appellants used a statistical river flow at the "50% Exceedance" level based on only one water-year, (1931-32), to derive the weighted usable area habitat indicators. Appellants erroneously concluded that such habitat indicators alone constitute "existing habitat" for purposes of base flow determination. The other opinion erroneously adopts appellants' methodology.

The 50% Exceedance ("50% E") flow is a statistical figure which the Federal Energy Regulatory Commission requires be used for hydroelectric permit applications. 50% E is also a calculation in harmony with engineering/design criteria. However, there is little credible testimony in this proceeding that the 50% E flow levels are in fact grounded in the biological habitat requirements of fish.

In addition, appellants' 50% E levels were based on 1931-32 *median* flow figures, that is: half the time in a

³ In February, when there is no spawning stage, DOE used the juvenile rearing stage.

given month in 1931-32 the flows exceeded that statistical level, and half the time they were less. In the real world, there can be a vast difference in flow levels between 50% E median flows and average (*mean*) flows, e.g., in one month 210 cfs was the median, whereas 800 cfs was the mean. In this project, appellants' base flows will reduce in-stream flows to the 95% E level; 95% of the time the in-stream flows remaining in the bypass would be less than the 1931-32 *median* flows.

X

The Washington Department of Ecology, three resource agencies—Washington State Departments of Game and of Fisheries, and the U.S. Fish and Wildlife Service—and the Indian Point No Point Treaty Council, all determined that the model-derived 50% E median flows based solely on one water-year did not sufficiently measure real-life existing habitat in the dynamic Dosewallips River. There was abundant evidence of the incorrectness of appellants' choice of solely 1931-32, one year for modeling, and their use of median figures. The other opinion's cryptic approval (at Finding of Fact XI) essentially ignores the evidence.

XI

During the evaluation stage, in addition to optimizing for the fry life stage, DOE and the other resource agencies evaluated other habitat factors in deriving the base flows.

At all life stages fish are subject to predation. When confined to less water due to lower flows, i.e., both less area and less depth, predation is likely to be enhanced and fish losses increased. Lower flows also provide less protection by decreasing the cover provided by bubbles, making the fish more visible.

With the decrease in flows, the fish are confined to smaller areas when competing for spawning territory and

for food. The abundance of a variety of food prey, including insects, is related to flow. In addition, as stream temperatures increase during the year, fish metabolism increases, as does food consumption, thereby heightening territorial conflicts resulting from lower flows.

With less flow and water velocity, water-borne sediments are deposited onto the substrate at higher rates, increasing the risk of smothering eggs and harming prey organisms. The greatest significant increase in sediment deposit occurs during intermediate flows.

At the present time, prior to diversion, there are no known barriers to fish upstream migration below or through the Dosewallips bypass reach. Decreased flows have the likely potential to create barriers by not providing sufficient water for fish to leap upstream.

Appellants' base flows rely solely on the model, and did not account for these significant habitat factors.

X [sic]

The Department of Ecology correctly exercised their responsibility to evaluate the model numbers, determined which life stage is most flow-dependent, and further evaluated real-world habitat factors in determining base flows. The Department did so in conjunction with numerous experts from several resource agencies, both state and federal. Appellants' sole witness did not prove that the Department of Ecology's base flows do more than preserve potential habitat. To the contrary, their sole witness testified that he could not conclude that the DOE base flows would enhance fish production.

Appellants have clearly not sustained their legal burden.

XI [sic]

The Water Quality Certification provides for base flows to preserve fish production potential in conformance with

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RCW 90.54.020(3)(a). Therefore, no maximum net benefits test need have been performed. Appellants have failed to prove that these are enhancement flows.

The Department of Ecology's base flows should be **AFFIRMED**.

DONE this 25th day of January, 1989.

/s/ Judith A. Bendor
JUDITH A. BENDOR,
Member

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Attachment One

Month	Existing	DOE Base Flow	Tacoma's Proposed Base Flow
	(50% Exceedence flow)		
	(CFS)	(CFS)	(CFS)
Jan.	340	140	100
Feb.	302	100	75
March	325	200	145
April	408	200	130
May	689	200	105
June	738	200	105
July	448	200	90
Aug.	222	200	170
Sept.	159	150	150
Oct.	149	140	140
Nov.	285	140	95
Dec.	397	140	75*

* Initially proposed as 65 CFS this flow was the subject of testimony at the hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

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APPENDIX F

**BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

**ORDER DENYING SECOND MOTION FOR
SUMMARY JUDGMENT**

On November 3, 1987, appellant City of Tacoma filed its Second Motion for Summary Judgment, together with Memorandum in Support, and Supplemental Memorandum in Support with attachment (*Rock Creek Limited Partnership*).

On November 13, 1987, respondent Department of Ecology filed its Second Cross Motion for Summary Judgment and Memorandum in Support.

On November 18, 1987, City of Tacoma filed a further attachment to its Supplemental Memorandum (*Rock Creek Limited Partnership—Order Denying Rehearing*).

Having considered these together with the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR

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56, appellant's second motion for summary judgment should be denied and respondent's second cross motion for summary judgment should be granted.

In these second motions the undisputed facts are the same as in the first motions disposed of by our Order entered April 10, 1987, and our Order following request for reconsideration entered May 26, 1987.

Appellant's second motion reiterates arguments concerning state laws which were advanced previously and disposed of by prior Orders.

Appellant's second motion also advances a Declaratory Order of the Federal Energy Regulatory Commission entitled, *Rock Creek Limited Partnership Project* No. 3189-014. This holds that a water appropriation permit granted by California under state law and containing minimum flow limitations is pre-empted by the provisions of the Federal Power Act. That matter is distinguishable from this case where the issue concerns a certification provided by another federal statute (Clean Water Act, Section 401), rather than state law. Both the reasoning and conclusion of *Rock Creek* are inapposite to this appeal.

Wherefore the Board enters this

ORDER

Appellant City of Tacoma's Second Motion for Summary Judgment is denied. Respondent Department of Ecology's Second Cross Motion for Summary Judgment is granted.

DONE at Lacey, WA, this 9th day of December, 1987.

**POLLUTION CONTROL HEARINGS
BOARD**

/s/ Wick Dufford
WICK DUFFORD
Chairman

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/s/ Lawrence J. Faulk 12/8/87
LAWRENCE J. FAULK
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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APPENDIX G

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

April 10, 1987

Mark L. Bubenik
Assistant City Attorney
City of Tacoma
Department of Public Utilities
Tacoma, Washington 98411

Jay J. Manning
Assistant Attorney General
Department of Ecology
Mail Stop: PV-11
Olympia, WA 98504

Counselors:

Re: PCHB No. 86-118
PUD #1 OF JEFFERSON COUNTY & CITY OF TA-
COMA UTILITIES DEPARTMENT V. DOE

Enclosed is the Board's "Order Granting Cross Mo-
tion for Summary Judgment."

This is a FINAL ORDER for purposes of appeal pur-
suant to WAC 371-08-220.

Very truly yours,

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

WAH:tr
Enclosure

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

No. 86-118

IN THE MATTER of a Section 401 Water Quality
Certification granted by Department of Ecology
to PUD No. 1 of Jefferson County and
City of Tacoma

PUD No. 1 OF JEFFERSON COUNTY, and
CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

ORDER GRANTING CROSS MOTION
FOR SUMMARY JUDGMENT

Having considered the following:

1. City of Tacoma's Motion for Summary Judgment filed December 12, 1987, together with Exhibits A, B and C and affidavits of Messrs. Philip Hilgert and Eugene Welch and Tacoma's Memorandum filed therewith.
2. Statement of Additional Authorities filed January 24, 1987, by the City of Tacoma.
3. State Department of Ecology's Cross Motion for Summary Judgment filed January 28, 1987, together with Memorandum and affidavits of Messrs. Brad

Caldwell, Walter Bergstrom, Kenneth J. Bruya, and Hal Beecher.

4. City of Tacoma's Memorandum in Reply to DOE's Memorandum in Opposition, filed February 4, 1987.

and having considered the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR 56, summary judgment should be granted.

The undisputed facts are as follows:

1. Appellants, Jefferson County Public Utility District No. 1 and the City of Tacoma, seek to develop a new hydroelectric power facility on the Dosewallips River of the Olympic Peninsula in Washington State.

2. Appellants must first obtain a federal license from the Federal Energy Regulatory Commission before proceeding to develop the hydroelectric facility.

3. Because the development requires a federal license, appellants must secure from the State of Washington a "water quality certification". The requirement to obtain such a certification is found within the federal Clean Water Act at Section 401 (codified as 33 U.S.C., Sec. 1341).

4. The appellants requested the Section 401 water quality certification from the state agency responsible for considering such requests, the Washington State Department of Ecology (DOE).

5. In making their request for Section 401 water quality certification, appellants described to DOE the nature of their proposed, new hydroelectric facility. It is not a traditional dam arrangement. Rather, it is a "run of the river" proposal in which water would be diverted from the Dosewallips and run through a long pipe ("penstock") running parallel to the river and downstream for

a little over one mile. The penstock, however, would remain at a relatively constant elevation while the river drops steeply below. The penstock, at its downstream end, then drops abruptly forcing its water through a power house from which the water then re-enters the river. Thus there would be some degree of "de-watering" within the one mile stretch of the river bypassed by the penstock.

6. The Dosewallips River supports a salmon and steel-head fishery. These fish presently inhabit the by-pass reach.

7. The Dosewallips River derives its origins in the high Peaks of the Olympic Range within the Olympic National Park. After flowing its course through wooded highlands it descends to discharge its waters to the Hood Canal. It is an important scenic asset of the State of Washington.

8. On June 11, 1986, DOE granted appellants request by issuing a Section 401 water quality certification. This contained a limitation, however, to which appellants object and which forms the basis of their appeal now before us. The limitation states:

5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

January	140	cfs	or	natural flow
February	100	cfs	or	natural flow
March	200	cfs	or	natural flow
April	200	cfs	or	natural flow
May	200	cfs	or	natural flow
June	200	crs [sic]	or	natural flow
July	200	cfs	or	natural flow
August	200	cfs	or	natural flow
September	150	cfs	or	natural flow
October	140	cfs	or	natural flow
November	140	cfs	or	natural flow
December	140	cfs	or	natural flow

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperatin [sic] with these other agencies.

9. Appellants contend that DOE has exceeded its statutory authority in placing this limitation [sic]. The DOE contends that it has not.

From which the Board reaches the following conclusions:

1. The Section 401 water quality certification which appellants need from the state to proceed must certify that the discharge will comply with Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act. These sections deal, so far as pertinent here, with what are known as "water quality standards" and the "effluent limitations" necessary to meet those standards.

2. Water quality *standards* have been promulgated by the state, with federal overview, under federal and state clean water acts. These standards are published at chapter 173-201 WAC and concern such things as fecal coliform, dissolved oxygen, dissolved gas, temperature, pH and other micro-characteristics. Similarly, effluent limitations are imposed by the permit system published at chapter 173-220 WAC and concern the same micro-characteristics.

3. In this matter, appellants assert that the base flow limitation in question is not justified by reference to water quality *standards* or effluent limitations. We do not understand DOE to take issue with this. See, for example, the affidavit of Mr. Walter Bergstrom who swears that in writing the words:

"... these flows are in excess of those required to maintain water quality in the bypass region . . ."

he meant and was referring to water temperature. Page 2, Lines 1-13. Water temperature is among the charac-

teristics for which there is a water quality standard. WAC 173-201-045(1)(c)(iv). We conclude that the base flow limitation in question is not supported by, nor intended to be supported by, water quality standards.

4. There is more, however, to Section 401, than certifying compliance with water quality standards or effluent limitations. Within subsection (d) of Section 401 it states:

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard [sic] of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(Emphasis added).

5. In interpreting the meaning of the statutory phrase "any other appropriate requirement of State law" we embrace with approval the interpretation taken by the Oregon Court of Appeals in *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986) cited by the parties:

"Congress did not make the section 1313 [water quality] standards the exclusive water quality criteria which the states may use in placing limitations on section 1341 [water quality] certificates. If Congress had intended to do so, it could have specifically

mentioned those standards in section 1341(d) [quoted at conclusion 4. above], but it did not. Rather, it allowed the states to enforce *all* water quality—related statutes and rules through the states' authority to place limitations on section 1341 [401] certificates." P.1279 [Wording in brackets added]. *Emphasis in original.*

We see nothing in *Power Authority v. Department of Environmental Conservation* 379 F. Supp. 243 (1974), cited by appellant, which is at variance with the conclusion from *Arnold*, above. *Power Authority*, in language emphasized at page 6 of appellant's memorandum, merely memorializes the well known authority of states to adopt more restrictive standards than the federal Clean Water Act provides. This does not bear upon the distinction between technical water quality standards and other forms of state water quality legislation, nor the scope of Section 401(d) with regard to each. We conclude that a Section 401 water quality certificate may include limitations to enforce all state water quality—related statutes and rules including, but not limited to, water quality standards.

6. In 1971 the Legislature of the State of Washington enacted the Water Resources Act, chapter 90.54 RCW. By that Act it was established that:

"Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(3) The *quality* of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which*

would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest would be served. RCW 90.54.020. *Emphasis added.*

Through enactment of this legislation [sic], the quality of state waters such as the Dosewallips River is not to be determined solely by peering into a microscope. Rather, the quality is affected when factors comprising the essential character of the river are affected, such as the route and quantity of the river's flow.

7. The provision of the Water Resources Act calling for preservation of base flows in perennial rivers of the state, RCW 90.54.020(3)(a), is a water quality—related state statute which is an "appropriate requirement of State law" under Section 401(d) of the federal Clean Water Act.

8. Base flow limitations of the kind at issue are an appropriate measure to carry out RCW 90.54.020(3)(a) of the Water Resources Act. We have previously sustained the practice of providing such base flows by regulatory orders or the permit issuing process in the context of water rights disputes. *Smith v. Department of Ecology*, PCHB No. 81-34 (1981) and *Northwest Steelhead and Salmon Council v. City of Tacoma*, PCHB No. 81-148 (1982). Base flow limitations are an equally appropriate measure to carry out the Water Resources Act in the context of a Section 401 water quality certification that will become a condition on a federal license.

9. The Department of Ecology acted within the authority conferred by Section 401(d) of the federal Clean Water Act in placing base flow limitations within its water quality certification for preservation of the fishery resource and related values.

Wherefore the Board enters this

ORDER

The appellant's Motion for Summary Judgment is denied. The Department of Ecology's Cross Motion for Summary Judgment is granted.

DONE at Lacey, Washington this 10th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

/s/ Lawrence J. Faulk
LAWRENCE J. FAULK
Chairman

/s/ Wick Dufford
WICK DUFFORD
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

APPENDIX H

[SEAL]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
7272 Cleanwater Lane, LU-11
Olympia, Washington 98504-6811
(206) 753-2353

June 11, 1986

P.U.D. No. 1
Jefferson County Courthouse
Port Townsend, Washington 98368

Gentlemen:

Water Quality Certification Request

This letter is in response to your request for Water Quality Certification for the Elkhorn Hydroelectric Project (FERC No. 6002) Certification is hereby granted as required by Section 401 of the Federal Water Pollution Control Act, provided the following conditions are met:

1. A *Short-Term Modification to the Water Quality Criteria* (WAC 173-20-035) must be obtained from the Department of Ecology prior to the start of work in the waterway. This authorization is required when instream construction activities will unavoidably violate state water quality criteria (particularly turbidity) on a short-term basis. It will not be issued until the project is actually starting toward construction, evidenced by advertising for bids to construct. The application shall be submitted to the Southwest Regional Office of the Department of Ecology a minimum of 180 days before construction is scheduled to commence.

2. The request for a short-term modification shall include a plan of operation which identifies a sequence of construction events, together with provisions for mitigating water quality impacts, and a copy of the Hydraulics Project Approval secured from the Washington Departments of Fisheries and Game.
3. All construction contracts for this project shall contain specific provisions for water pollution control. The contracts shall also provide specific payment provisions for unanticipated water pollution control measures.
4. Prior to completion of the final project design, the applicant shall evaluate the future operation of the existing cleanout gate with respect to compliance with water quality standards during operation of this facility and submit a proposal which addresses the maintenance task of accumulated sediment removal.
5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

January	140	cfs	or	natural flow
February	100	cfs	or	natural flow
March	200	cfs	or	natural flow
April	200	cfs	or	natural flow
May	200	cfs	or	natural flow
June	200	cfs	or	natural flow
July	200	cfs	or	natural flow
August	200	cfs	or	natural flow
September	150	cfs	or	natural flow
October	140	cfs	or	natural flow
November	140	cfs	or	natural flow
December	140	cfs	or	natural flow

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows

recommend by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies.

6. *Specific Construction Activity Conditions*

Care will be taken to prevent any petroleum products, paint, chemicals, or other harmful materials from entering the water.

All construction debris will be disposed of on land so it cannot enter state waters.

All lumber treated with creosote or other protective material will be completely dry before use in or near the waterway.

No wood waste or other organic material is to be used in any fill.

Only clean, durable riprap will be used.

Dredge spoils and/or excess excavated material shall be disposed of in a manner that prevents the spoils, leachates or drainage from the spoils, from entering state waters.

All sanitary wastes generated at the power plant during construction and operation shall be discharged to the sewerage system. Solid wastes generated at the power plant during construction and operation shall be disposed of in accordance with the regulations of the local health district.

Oil spill containment and cleanup equipment shall be on hand at the power plant at all times.

Failure to comply with the conditions described above may result in revocation of this water quality certification and issuance of civil penalties in accordance with the enforcement policies and guidelines of the Department of Ecology.

Sincerely,

/s/ Clark Haberman
CLARK HABERMAN
Regional Manager

CH:pw(WB4/5)

APPENDIX I

ELKHORN HYDROELECTRIC PROJECT				
Month	Median Monthly Flow (cfs)	Applicant's 7/25/85 Proposal (cfs)	Agency/Tribal 10/85 Proposal (cfs)	Applicant's 1/14/85 Proposal (cfs)
Jan	340	65	140	100
Feb	302	75	100	75
Mar	325	75	200	145
Apr	408	75	200	130
May	689	75	200	105
Jun	738	75	200	105
Jul	448	75/85	200	90
Aug	222	130	200	170
Sep	159	125	150	150
Oct	149	155	140	140
Nov	285	75	140	95
Dec	397	65	140	65

APPENDIX J

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUD NO. 1 OF JEFFERSON)
COUNTY, and CITY OF)
TACOMA DEPARTMENT)
OF PUBLIC UTILITIES,)

Appellant,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

) PCHB No. 86-118

) AFFIDAVIT OF
) WALTER BERGSTROM

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss.

I, Walter Bergstrom, being first duly sworn upon
oath, depose and say:

KENNETH O. EIKENBERRY, ATTORNEY GENERAL

Jay J. Manning

Assistant Attorney General

Attorney General's Office

Ecology Division, Mail Stop PV-11

Olympia, Wa. (206) 451-6158

98504

Telephone

[SEAL]

1. I am over 18 years of age and competent to testify herein.

2. I have been employed by the Department of Ecology, or one of its predecessor agencies, for 25 years. I am a water resources specialist. I have a Bachelor of Science Degree from Oregon State University in Agricultural Engineering.

3. I helped prepare the water quality certification that was issued on June 11, 1986, for the proposed Elkhorn hydroelectric project. Specifically, I wrote Condition 5, which imposes a minimum instream flow condition on the project. I wrote the language

while these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource.

The term "water quality" as I used it in the preceding quote refers to the temperature of the water itself. In other words, when I stated that the flows are in excess of those required to maintain water quality, I meant that the flows are more than are necessary to ensure compliance with the applicable water quality standards for temperature. WAC 173-201(1)(c)(iv). When I used the term "water quality" in Condition 5 in the water quality certification, I was not referring to the stream's biological quality, physical quality, or aesthetic quality.

4. When the City of Tacoma applies for a water right permit for the Elkhorn project, the Department of Ecology will, in my opinion, condition any water right permit for the project, if such a permit is issued, to require a minimum instream flow similar or identical to the one in the water quality certification.

/s/
WALTER BERGSTROM

SUBSCRIBED AND SWORN to before me this 28th day
of January, 1987.

/s/
NOTARY PUBLIC in and for the
State of Washington.
My commission expires. 1/16/90

APPENDIX K

[SEAL] UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 1991

OFFICE OF
WATER

Honorable Lois D. Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, NE
Washington, D.C. 20426

Dear Ms. Cashell:

I am writing on behalf of the Environmental Protection Agency's (EPA) Office of Water to help clarify issues regarding the application of Clean Water Act Section 401 state water quality certification to Federal Energy Regulatory Commission (FERC) licenses. This letter was precipitated by FERC documents addressing Section 401 certification; a letter of July 25, 1990, to James Elder, Director, Office of Water Enforcement and Permits, from Fred Springer of your staff; and portions of a June 5, 1990, Report of the Staff of the Federal Energy Regulatory Commission to the Water and Power Subcommittee of the U.S. Senate Energy and Natural Resources Committee.

The FERC report (page 4) asserts that state Section 401 certification conditions on FERC licenses related to "fish, wildlife, vegetation and recreation" are inappropriate. However, protection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain

the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes. A State may need to address any one or combination of these factors in particular circumstances in order to meet the mandates of the Clean Water Act (CWA) articulated in Section 101(a) "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."

State water quality standards form the backbone for formulating Section 401 decisions. EPA regulations (40 CFR Part 131) implementing Section 303(c)(2)(A) of the CWA require that States adopt water quality standards having three basic components: use designations, criteria to protect those uses, and an antidegradation policy. EPA regulations direct that, where attainable, States must designate uses to meet the CWA goal in Section 101(a)(2) of water quality which "provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water." States must develop criteria designed to protect and maintain these designated water uses. States are not limited to adopting chemical-specific criteria, but are exhorted to adopt narrative and numerical criteria (40 CFR 131.11(b)). In addition, EPA's Fiscal Year 1991 Operating Guidance provides that by September 30, 1993, all States are to adopt biological criteria into their water quality standards. EPA regulations also require that States adopt antidegradation policies providing for protection of existing uses and the level of water quality necessary to maintain those uses. In the case of fill activities in wetlands, existing use requirements are met if the activity does not cause or contribute to significant degradation of the aquatic environment as defined in the guidelines developed under Section 404(b)(1) of the CWA.

In its letter, FERC expressed concern that States may be imposing conditions in hydropower licenses which go beyond EPA water quality standard requirements. As we explained above, water quality standards go well beyond chemical-specific criteria. In addition, Section 510(1) of the CWA expressly

reserves the right of States to adopt or enforce "(A) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" that are equal to or more stringent than Federal standards or limitations. If a State imposes conditions or denies certification beyond the bounds of its authority, such conditions or denials may be challenged through the State administrative and judicial system.¹

The FERC letter inquires about EPA's authority to limit State Section 401 decisions. As noted earlier, States have the authority to impose more stringent environmental standards. In addition, EPA's authority under Section 401 is limited. While EPA approves State water quality standards and, if necessary, promulgates Federal water quality standards, we do not have the authority to countermand State Section 401 certification decisions. The only exception is that EPA regulations (40 CFR Section 124.55(c)) provide for EPA to disregard State certification conditions or certification denials when the grounds for the decision is that State law allows a less stringent permit condition. Under Section 401(a)(1), EPA has authority to conduct Section 401 certification decisions in cases where the State does not have the authority. For example, EPA issues certifications for South Dakota and for some Indian Tribes. In addition, Section 401(a) gives EPA specific responsibilities for notification and recommendations in cases where a discharge

¹ We acknowledge some divergence in State Court decisions interpreting Section 401 certification authority. Compare In re Lava Diversion Project, 717 P.2d 1274 (Ore App. 1986) (allowing consideration of State land use planning in the State's 401 certification conditions) with Fourth Branch Associates v. Department of Environmental Conservation, 550 N.Y.S. 2d 769 (Albany Co., 1989) (limiting State certification decision to whether project will violate water quality standards). These decisions, however, were reached without any consideration of the views of EPA, the primary Federal agency responsible for implementation of the CWA. In any case, Section 401(d) of the CWA gives the States authority to place any conditions on water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, standards of performance, or pretreatment standards (Sections 301, 302, 303, 306, and 307 of the CWA) and with "any other appropriate requirements of State law."

may affect the waters of any State other than the State in which the discharge originates.

EPA has issued, and will continue to issue, guidance and technical assistance for States to use in developing water quality standards and in implementing their Section 401 programs. Guidance on implementing water quality standards is included in EPA's Water Quality Standards Handbook. Recently, EPA issued program guidance on biological criteria (April 1990), and guidance on water quality standards for wetlands (July 1990). In addition, EPA is developing sediment criteria guidance and biological effects-based testing procedures for contaminated sediments, revisions to the water quality standards regulation, and other guidance as needed. In April 1989, we issued a handbook for States on the application of Section 401 certification to wetlands. Finally, as the principal agency responsible for administering the CWA, EPA routinely communicates its interpretation of statutory provisions such as those under Section 401 to State and Federal agencies.

I hope that this letter has clarified EPA's position on the broad range of elements that States need to include in their water quality standards to protect the quality of the nation's waters, the application of these and other considerations in Section 401 certification, and EPA's role in the certification process. If you have any questions regarding this letter or wish to meet to discuss water quality issues as they relate to your agency, please call me or have your staff contact Martha Prothro, Director, Office of Water Regulations and Standards (382-5400).

Sincerely yours,

/s/

LaJuana S. Wilcher
Assistant Administrator

APPENDIX L

**Chapter 173-201 WAC
WATER QUALITY STANDARDS FOR WATERS OF
THE STATE OF WASHINGTON**

WAC

173-201-010	Purpose.
173-201-020	Water use and quality criteria.
173-201-025	Definitions.
173-201-030	Repealed.
173-201-035	General considerations.
173-201-040	Repealed.
173-201-045	General water use and criteria classes.
173-201-050	Characteristic uses to be protected.
173-201-060	Repealed.
173-201-070	General classifications.
173-201-080	Specific classifications—Freshwater.
173-201-085	Specific classifications—Marine water.
173-201-090	Achievement considerations.
173-201-100	Implementation.
173-201-110	Surveillance.
173-201-120	Enforcement.
173-201-130	Repealed.
173-201-140	Miscellaneous.

**DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS
CHAPTER**

173-201-030	Water use and quality criteria—General water use and criteria classes. [Order 73-4, § 173-201-030, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-040	Water use and quality criteria—General considerations. [Order 73-4, § 173-201-040, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-060	Water course classification. [Order 73-4, § 173-201-060, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-130	Definitions. [Order 73-4, § 173-201-130, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.

WAC 173-201-010 Purpose. The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington pursuant to the provisions of chapter 90.48 RCW and the policies and purposes thereof. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-010, filed 1/17/78; Order 73-4, § 173-201-010, filed 7/6/73.]

WAC 173-201-020 Water use and quality criteria. The water use and quality criteria set forth in WAC 173-201-035 through 173-201-050 are established in conformance with present and potential water uses of said surface waters and in consideration of the natural water quality potential and limitations of the same. Nonetheless, the dynamic nature of the process is also recognized. Hence, frequent review of these uses and criteria is anticipated; and revisions will be undertaken as additional information is developed. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-020, filed 1/17/78; Order 73-4, § 173-201-020, filed 7/6/73.]

WAC 173-201-025 Definitions. (1) Background Conditions: The biological, chemical, and physical conditions of a water body, upstream from the point or nonpoint source of any discharge under consideration. Background sampling location in an enforcement action would be upstream from the point of discharge, but not upstream from other inflows. If several discharges to any water body exist, and enforcement action is being taken for possible violations to the standards, background sampling would be undertaken immediately upstream from each discharge.

(2) Fecal Coliform: That portion of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within 24 hours at 44.5 degrees plus or minus 0.2 degrees C.

(3) Mean Detention Time: The time obtained by dividing a reservoir's mean annual minimum total storage by the 30-day ten-year low-flow from the reservoir.

(4) Median Value: That value of a group of measurements that falls in the middle when the measurements are arranged in order of magnitude. If the number of measurements is even, the median value would be the value half-way between the two middle measurements.

(5) Permit: A document issued pursuant to RCW 90.48.160 et seq. or RCW 90.48.260 or both, specifying the waste treatment and control requirements and waste discharge conditions.

(6) pH: The negative logarithm of the hydrogen ion concentration.

(7) Surface Waters of the State: Include lakes, rivers,

ponds, streams, inland waters, saltwaters, and all other surface waters and water courses within the jurisdiction of the state of Washington.

(8) Temperature: Temperature expressed in degrees Celsius.

(9) Turbidity: The clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

(10) Upwelling: Upwelling is a direct result of wind stress on the sea surface. As winds blow parallel to a coast, the net flow of water is at an angle of about 45° toward the sea. This flow causes cold bottom water to move upward to replace the warmer surface water moving offshore. The cold water is rich in dissolved nutrients and has a low dissolved oxygen content. [Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-025, filed 1/17/78.]

WAC 173-201-030 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-035 General considerations. The following general guidelines shall apply to the water quality criteria and classifications set forth in WAC 173-201-020 through 173-201-085 hereof:

(1) At the boundary between waters of different classifications, the water quality criteria for the higher classification shall prevail.

(2) In brackish waters of estuaries, where the fresh and marine water quality criteria differ within the same classification, the criteria shall be interpolated on the basis of salinity; except that the marine water quality criteria shall apply for dissolved oxygen when the salinity is one part per thousand or greater and for fecal coliform organisms when the salinity is ten parts per thousand or greater.

(3) The water quality criteria herein established shall not apply within an authorized dilution zone adjacent to or surrounding a waste-water discharge.

(4) Generally, waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, shall be conditioned in such manner as to authorize discharges which meet the water quality standards.

(a) However, persons discharging wastes in compliance with the terms and conditions of permits shall not

be subject to civil and criminal penalties on the basis that discharge violates receiving water standards.

(b) Permits shall be subject to modification by the department of ecology whenever it appears to the department the discharge violates receiving water standards. Modification of permits, as provided herein, shall be subject to review in the same manner as originally issued permits.

(5) Nonpoint Sources and Water Quality Standards.

(a) It is recognized that many activities not subject to a waste discharge permit system are now being performed in the state, which result in conflicts with the receiving water quality standards of this chapter. Further, the department has not developed a program which, in a reasonable or fully satisfactory manner, provides methods or means for meeting such standards. Persons conducting such activities shall not be subject to civil or criminal sanctions for violation of water quality standards if the activities are either:

(i) Conducted in accordance with management practices set forth by rules of the department.

For example, promulgation of regulations by the department which set forth approved management practices or other effluent limits shall be accomplished so that activities conducted within such regulations, (i.e., Forest Practices Rules and Regulations chapter 173-202 WAC and Title 222 WAC) will achieve compliance with water pollution control laws. When the regulations are violated, the water quality standard can be enforced as described in WAC 173-201-045; or,

(ii) Subject to a regulatory order issued by the department relating to specific activities as provided for in WAC 173-201-100(2).

(b) Management practices or regulatory orders described in WAC 173-201-035(5) hereof, shall be subject to modification by the department of ecology whenever it appears to the department that the discharge violates receiving water standards. Modification of management practices or regulatory orders, as provided herein, shall be subject to review in the same manner as the originally issued management practices or regulatory orders.

(6) The water quality criteria herein established for total dissolved gas shall not apply when the stream flow exceeds the 7-day, 10-year frequency flood.

(7) The total area and/or volume of a receiving water

assigned to a dilution zone shall be as described in a valid discharge permit as needed and be limited to that which will:

(a) Not cause acute mortalities of sport, food, or commercial fish and shellfish species of established biological communities within populations or important species to a degree which damages the ecosystem.

(b) Not diminish aesthetic values or other beneficial uses disproportionately.

(8) The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) It shall be the intent of this policy that existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

(c) Whenever receiving waters of a classified area are of a higher quality than the criteria assigned for said area, the existing water quality shall be protected and waste and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except, in those instances where:

(i) It is clear that overriding considerations of the public interest will be served, and

(ii) All wastes and other materials and substances proposed for discharge into the said waters shall be provided with all known, available, and reasonable methods of treatment before discharge.

(d) Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural conditions shall constitute the water quality criteria.

(e) The criteria established in WAC 173-201-045 may be modified for a specific water body on a short-term basis when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest. Such modification shall be issued in writing by the director or his designee subject to such terms and conditions as he may prescribe.

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes

injurious to existing water uses and causes long-term and irreparable harm to the environment.

(g) It shall be the policy of the state of Washington that no waste discharge permit be issued which will violate established water quality criteria for the said waters, except, as provided for under WAC 173-201-035(8)(e).

(9) Due consideration will be given to the precision and accuracy of the sampling and analytical methods used as well as existing conditions at the time, in the application of the criteria.

(10) The analytical testing methods for these criteria shall be in accordance with the most recent editions of "Standard Methods for the Examination of Water and Wastewater," published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation, and "Methods for Chemical Analysis of Water and Wastes," published by EPA, and other or superseding methods published and/or approved by the department following consultation with adjacent states and concurrence of the Environmental Protection Agency.

(11) Deleterious concentrations of radioactive materials for all classes shall be as determined by the lowest practicable concentration attainable and in no case shall exceed:

(a) 1/100 of the values listed in WAC 402-24-220 (Column 2, Table II, Appendix A, Rules and Regulations for Radiation Protection); or,

(b) The United States Environmental Protection Agency Drinking Water Regulations for radionuclides, as published in the Federal Register of July 9, 1976, or subsequent revisions thereto.

(12) Deleterious concentrations of toxic, or other non-radioactive materials, shall be determined by the department in consideration of the Quality Criteria for Water, published by EPA 1976, and as revised, as the authoritative source for criteria and/or other relevant information, if justified.

(13) Nothing in this chapter shall be interpreted to be applicable to those aspects of governmental regulation of radioactive wastes which have been preempted from state regulation by the Atomic Energy Act of 1954, as amended, as interpreted by the United States Supreme Court in the cases of Northern States Power Co. v. Minnesota 405 U.S. 1035 (1972) and Train v. Colorado Public Interest Research Group 426 U.S. 1 (1976). [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-035, filed 1/17/78.]

WAC 173-201-040 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-045 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **CLASS AA (EXTRAORDINARY).**

(a) **General Characteristic.** Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) **Characteristic Uses.** Characteristic uses shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) General marine recreation and navigation.
- (v) Fish and shellfish reproduction, rearing, and harvesting.

(c) **Water Quality Criteria.**

(i) **Fecal Coliform Organisms.**

(A) **Freshwater** – Fecal coliform organisms shall not exceed a median value of 50 organisms/100 ml, with not more than 10 percent of samples exceeding 100 organisms/100 ml.

(B) **Marine water** – Fecal coliform organisms shall not exceed a median value of 14 organisms/100 ml, with not more than 10 percent of samples exceeding 43 organisms/100 ml.

(ii) **Dissolved oxygen.**

(A) **Freshwater** – Dissolved oxygen shall exceed 9.5 mg/l.

(B) **Marine water** – Dissolved oxygen shall exceed 7.0 mg/l except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) **Total dissolved gas** – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) **Temperature** – water temperatures shall not exceed 16.0° Celsius (freshwater) or 13.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=23/(T+5)$ (freshwater) or $t=8/(T-4)$ (marine water).

When natural conditions exceed 16.0° Celsius (freshwater) and 13.0° Celsius (marine water), no temperature increase will be allowed which will raise the

receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 16.3° Celsius (freshwater).

(v) **pH** shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.2 units.

(vi) **Turbidity** shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) **Toxic, radioactive, or deleterious material concentrations** shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) **Aesthetic values** shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(2) **CLASS A (EXCELLENT).**

(a) **General Characteristic.** Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) **Characteristic Uses.** Characteristic uses shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) Commerce and navigation.
- (v) Fish and shellfish reproduction, rearing, and harvesting.

(c) **Water Quality Criteria.**

(i) **Fecal Coliform Organisms.**

(A) **Freshwater** – Fecal coliform organisms shall not exceed a median value of 100 organisms/100 ml, with not more than 10 percent of samples exceeding 200 organisms/100 ml.

(B) **Marine water** – Fecal coliform organisms shall

not exceed a median value of 14 organisms/100 ml, with not more than 10 percent of samples exceeding 43 organisms/100 ml.

(ii) Dissolved Oxygen.

(A) Freshwater – Dissolved oxygen shall exceed 8.0 mg/l.

(B) Marine water – Dissolved oxygen shall exceed 6.0 mg/l, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – water temperatures shall not exceed 18.0° Celsius (freshwater) or 16.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 28/(T+7)$ (freshwater) or $t = 12/(T-2)$ (marine water).

When natural conditions exceed 18.0° Celsius (freshwater) and 16.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 18.3° Celsius (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect any water use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of

natural origin, which offend the senses of sight, smell, touch, or taste.

(3) CLASS B (GOOD).

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements for most uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

(i) Industrial and agricultural water supply.

(ii) Fishery and wildlife habitat.

(iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, and boating).

(iv) Stock watering.

(v) Commerce and navigation.

(vi) Shellfish reproduction and rearing, and crustacea (crabs, shrimp, etc.) harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms.

(A) Freshwater – Fecal coliform organisms shall not exceed a median value of 200 organisms/100 ml, with not more than 10 percent of samples exceeding 400 organisms/100 ml.

(B) Marine water – Fecal coliform organisms shall not exceed a median value of 100 organisms/100 ml., with not more than 10 percent of samples exceeding 200 organisms/100 ml.

(ii) Dissolved Oxygen.

(A) Freshwater – Dissolved oxygen shall exceed 6.5 mg/l or 70 percent saturation whichever is greater.

(B) Marine water – Dissolved oxygen shall exceed 5.0 mg/l or 70 percent saturation, whichever is greater, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – water temperatures shall not exceed 21.0° Celsius (freshwater) or 19.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 34/(T+9)$ (freshwater) or $t = 16/T$ (marine water).

When natural conditions exceed 21.0° Celsius (freshwater) and 19.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 21.3° Celsius (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) and 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be reduced by dissolved, suspended, floating, or submerged matter not attributed to natural causes, so as to affect water use or taint the flesh of edible species.

(4) CLASS C (FAIR).

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements of selected and essential uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

- (i) Cooling water.
- (ii) Commerce and navigation.
- (iii) Fish passage.
- (iv) Boating.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms: (Marine water) shall not exceed a median value of 200 organisms/100 ml, with not more than 10 percent of samples exceeding 400 organisms/100 ml.

(ii) Dissolved Oxygen.

Marine water - Dissolved oxygen shall exceed 4.0 mg/l or 50 percent saturation, whichever is greater, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas - the concentration of total dissolved gas shall not exceed 110 percent saturation at any point of sample collection.

(iv) Temperature - water temperatures shall not exceed 24.0° Celsius (freshwater) or 22.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=39/(T+11)$ (freshwater) or $t=20/(T+2)$ (marine water).

When natural conditions exceed 24.0° Celsius (freshwater) and 22.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(v) pH shall be within the range of 6.5 to 9.0 (freshwater) or 6.5 to 9.0 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be interfered with by the presence of obnoxious wastes, slimes, aquatic growths, or materials which will taint the flesh of edible species.

(5) LAKE CLASS.

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses for waters of this class shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) Fish and shellfish reproduction, rearing, and

harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms. (Lakes and impoundments) shall not exceed a median value of 50 organisms/100 ml, with not more than 10 percent of samples exceeding 100 organisms/100 ml.

(ii) Dissolved oxygen – no measurable decrease from natural conditions.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – no measurable change from natural conditions.

(v) pH – no measurable change from natural conditions.

(vi) Turbidity shall not exceed 5 NTU over background conditions.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-045, filed 1/17/78.]

WAC 173-201-050 Characteristic uses to be protected. The following is a noninclusive list of uses to be protected by the various classifications for fresh and marine surface waters:

USES F=Freshwater M=Marine water	WATERCOURSE CLASSIFICATION				
	LAKE	AA	A	B	C
FISHERIES					
Salmonid					
Migration	F	FM	FM	FM	FM
Rearing	F	FM	FM	FM	
Spawning	F	F	F		
Warm Water Game Fish					
Rearing	F	F	F	F	
Spawning	F	F	F	F	
Other Food Fish	F	FM	FM	FM	
Commercial Fishing	F	FM	FM	FM	
Shellfish	F	M	M	M	
WILDLIFE	F	FM	FM	FM	
RECREATION					
Water Contact	F	FM	FM		
Boating and Fishing	F	FM	FM	FM	FM
Environmental Aesthetics	F	FM	FM	FM	FM

WATER SUPPLY

Domestic	F	F	F		
Industrial	F	FM	FM	FM	FM
Agricultural	F	F	F	F	F
NAVIGATION	F	FM	FM	FM	FM
LOG STORAGE & RAFT- ING	F	FM	FM	FM	FM
HYDRO-POWER	F	F	F	F	F

[Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-050, filed 1/17/78; Order 73-4, § 173-201-050, filed 7/6/73.]

WAC 173-201-060 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-070 General classifications. General classifications applying to various surface water bodies not specifically classified under WAC 173-201-080 or 173-201-085 are as follows:

(1) All surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas, are hereby designated Class AA or Lake Class.

(2) All lakes and their feeder streams within the state are hereby designated Lake Class and Class AA respectively, except for those feeder streams specifically designated otherwise.

(3) All reservoirs with a mean detention time of greater than 15 days are classified Lake Class.

(4) All reservoirs with a mean detention time of 15 days or less are classified the same as the river section in which they are located.

(5) All reservoirs established on preexisting lakes are classified as Lake Class.

(6) All undesignated surface waters that are tributaries to Class AA waters are designated Class AA. All other undesignated surface waters within the state are hereby designated Class A. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-070, filed 1/17/78; Order 73-4, § 173-201-070, filed 7/6/73.]

WAC 173-201-080 —Specific classifications—Freshwater. Specific fresh surface waters of the state of Washington are classified as follows:

(1) American River from confluence with Bumping River to headwaters. Class AA

(2) Baker River.	Class AA
(3) Big Quilcene River and tributaries.	Class AA
(4) Bumping River from confluence with Naches River to headwaters.	Class AA
(5) Burnt Bridge Creek.	Class A
(6) Cascade River.	Class AA
(7) Cedar River from Lake Washington to Landsburg Dam.	Class A
(8) Cedar River from Landsburg Dam to headwaters. Special condition - no waste discharge will be permitted.	Class AA
(9) Chehalis River from Scammon Creek to Newaukum River. Special condition - dissolved oxygen shall exceed 5.0 mg/l or 50 percent saturation, whichever is greater, from June 1, to September 15. For the remainder of the year, the dissolved oxygen shall meet Class A criteria.	Class A
(10) Chehalis River from Newaukum River to Rock Creek.	Class A
(11) Chehalis River, from Rock Creek to headwaters.	Class AA
(12) Chehalis River, south fork, from mouth to headwaters.	Class A
(13) Chewack River from confluence with Methow River to headwaters.	Class AA
(14) Chiwawa River from confluence with Wenatchee River to headwaters.	Class AA
(15) Cispus River.	Class AA
(16) Clearwater River.	Class A
(17) Cle Elum River from confluence with Yakima River to Cle Elum Lake.	Class AA
(18) Cle Elum River from Cle Elum Lake to headwaters.	Class AA
(19) Cloquallum River from mouth to headwaters.	Class A
(20) Clover Creek from outlet of Lake Spanaway to inlet of Lake Steilacoom.	Class A
(21) Columbia River from mouth to the Washington-Oregon border (river mile 309). Special conditions - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by	

greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed 0.3° Celsius due to any single source or 1.1° Celsius due to all such activities combined. Dissolved oxygen shall exceed 90 percent of saturation.

(22) Columbia River from Washington-Oregon border (river mile 309) to Grand Coulee Dam (river mile 595). Special condition from Washington-Oregon border (river mile 309) to Priest Rapids Dam (river mile 397). Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t = 34 / (T + 9)$.

(23) Columbia River from Grand Coulee Dam (river mile 595) to Canadian border (river mile 742).

(24) Colville River.

(25) Coweeman River from mouth to Mulholland Creek.

(26) Coweeman River from Mulholland Creek to headwaters.

(27) Crab Creek and tributary streams from confluence with Columbia River to headwaters.

(28) Decker Creek from mouth to headwaters.

(29) Deschutes River from mouth to headwaters.

(30) Dickey River.

(31) Dosewallips River and tributaries.

(32) Duckabush River and tributaries.

(33) Dungeness River from mouth to Canyon Creek.

(34) Dungeness River and tributaries from Canyon Creek to headwaters.

(35) Duwamish River from mouth south of a line bearing 254° true from the NW corner of berth 3, terminal No. 37 to the confluence with the Black River (Tukwila).

(36) Duwamish River upstream from the

Class A

Class A

Class AA

Class A

Class A

Class AA

Class B

Class AA

Class A

Class A

Class AA

Class AA

Class A

Class AA

Class B

confluence with the Black River to the limit of tidal influence.

(37) Elwha River and tributaries.

(38) Entiat River from Wenatchee National Forest boundary to headwaters.

(39) Grande Ronde River from mouth to Oregon border (river mile 37). Special condition – temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(40) Grays River from Grays River Falls to headwaters.

(41) Green River (Cowlitz County) from mouth to headwaters.

(42) Green River (King County) from intersection of the river with west boundary of Sec. 27, T.21N. R.6E., to intersection of the river with west boundary of Sec. 13, T.21N., R.7E.

(43) Green River (King County) from intersection of the river with west boundary of Sec. 13, T.21N., R.7E., to headwaters. Special condition – no waste discharge will be permitted.

(44) Hamma Hamma River and tributaries.

(45) Hanaford Creek from mouth to east boundary line of Sec. 25, T.15N., R.2W. Special condition – dissolved oxygen shall exceed 6.5 mg/l or 70 percent saturation whichever is greater.

(46) Hanaford Creek from east boundary line of Sec. 25, T.15N., R.2W., to headwaters.

(47) Hoh River and tributaries from mouth to headwaters.

(48) Hoquiam River from mouth to river mile 9.

(49) Issaquah Creek from mouth to headwaters.

(50) Kalama River from lower Kalama River Falls to headwaters.

Class A

Class AA

Class AA

Class A

Class AA

Class AA

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class B

Class A

Class AA

(51) Klickitat River from Little Klickitat River to headwaters.

(52) Lake Washington Ship Canal from Lake Washington to Government Locks. Special condition – salinity shall not exceed one part per thousand (1.0 ppt) at any point or depth along a line that transects the ship canal at the University Bridge.

(53) Lewis River, east fork, from Multon Falls to headwaters.

(54) Little Wenatchee River from Lake Wenatchee to headwaters.

(55) Methow River from its confluence with the Chewack River to headwaters.

(56) Methow River from mouth to the confluence of the Chewack River.

(57) Mill Creek from confluence with Walla Walla River to 13th street bridge in Walla Walla. Special condition – dissolved oxygen concentration shall exceed 5.0 mg/l or 50 percent saturation whichever is greater.

(58) Mill creek from city of Walla Walla waterworks dam to headwaters. Special condition – no waste discharge will be permitted.

(59) Naches River from Snoqualmie National Forest boundary to headwaters.

(60) Naselle River from Naselle Falls to headwaters.

(61) Newaukum River from mouth to headwaters.

(62) Nisqually River from Alder Dam to headwaters.

(63) Nooksack River from mouth to river mile 4 (just below Ferndale).

(64) Nooksack River from confluence with Maple Creek to headwaters.

(65) Nooksack River, south fork, from Skookum Creek to headwaters.

(66) Nooksack River, middle fork.

(67) Okanogan River.

(68) Palouse River from mouth to Colfax (river mile 88, confluence with south fork).

(69) Palouse River from Colfax (river mile 88, confluence with south fork) to Idaho border (river mile 110). Special condition –

Class AA

Lake Class

Class AA

Class AA

Class AA

Class A

Class B

Class AA

Class AA

Class AA

Class A

Class AA

Class A

Class AA

Class AA

Class AA

Class A

Class B

Temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(70) Pend Oreille River from Canadian border (river mile 17) to Idaho border (river mile 86). Special condition – Temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(71) Pilchuck River from city of Snohomish waterworks dam to headwaters.

Class AA

(72) Puyallup River from mouth to river mile 1 (from mouth).

Class B

(73) Puyallup River from Kings Creek to headwaters.

Class AA

(74) Queets River from mouth to river mile 3.0.

Class AA

(75) Queets River and tributaries from river mile 3 to headwaters.

Class AA

(76) Quillayute River.

Class AA

(77) Quinault River from mouth to river mile 2.

Class AA

(78) Quinault River and tributaries from river mile 2 to headwaters.

Class AA

(79) Satsop River, east fork, from mouth to headwaters.

Class AA

(80) Satsop River, middle fork, from mouth to headwaters.

Class AA

(81) Satsop River, west fork, from mouth to headwaters.

Class AA

(82) Sauk River.

Class AA

(83) Skagit River from mouth to Burlington (river mile 17, Nookachamps Creek).

Class A

(84) Skagit River from Skiyou Slough, (river mile 26) to Canadian border (river mile 91).

Class AA

(85) Skokomish River and tributaries.

Class AA

(86) Skookumchuck River from Bloody Run Creek to headwaters.

Class AA

(87) Skykomish River from May Creek to headwaters.

Class AA

(88) Snake River from mouth to Washington-Idaho-Oregon border. Special condition – Temperature

(a) Below confluence with Clearwater River. Water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(b) Above confluence with Clearwater River. Water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed 0.3° Celsius due to any single source or 1.1° Celsius due to all such activities combined.

Class A

(89) Snohomish River from mouth and east of longitude 122°13'40"W. upstream to latitude 47°56'30"N. (southern tip of Ebey Island). Special condition: Fecal coliform organisms shall not exceed a median value of 200, organisms/100 ml. with not more than 10 percent of samples exceeding 400 organisms/100 ml.

Class A

(90) Snohomish River upstream from latitude 47°56'30"N. (southern tip of Ebey Island) to limit of tidal influence.

Class A

(91) Snoqualmie River, middle fork, from mouth to headwaters.

Class AA

(92) Snoqualmie River, north fork, from mouth to headwaters.

Class AA

(93) Snoqualmie River, south fork, from west boundary of Twin Falls State Park to headwaters.

Class AA

- (94) Soleduck River and tributaries. Class AA
- (95) Spokane River from mouth to Idaho border (river mile 91). Special condition - Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. Class A
- (96) Stillaguamish River from mouth to river mile 7 (at Norman). Class A
- (97) Stillaguamish River, north fork, from mouth to Squire Creek. Class A
- (98) Stillaguamish River, north fork, from Squire Creek to headwaters. Class AA
- (99) Stillaguamish River, south fork, from Canyon Creek to the headwaters. Class AA
- (100) Stehekin River from Lake Chelan to headwaters. Class AA
- (101) Suiattle River. Class AA
- (102) Sulphur Creek. Class B
- (103) Sultan River from mouth to Chaplain Creek. Class A
- (104) Sultan River from Chaplain Creek to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (105) Sumas River from Canadian border (river mile 12) to headwaters (river mile 23). Class A
- (106) Tieton River from confluence with Naches River to headwaters. Class AA
- (107) Tolt River from mouth to intersection of the river with west boundary of Sec. 31, T26N., R.9E. Class AA
- (108) Tolt River from intersection of the river with west boundary of Sec. 31, T.26N., R.9E. to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (109) Touchet River from Dayton water intake structure to headwaters. Class AA
- (110) Toutle River, north fork, from Green River to headwaters. Class AA
- (111) Toutle River, south fork, from mouth to headwaters. Class AA
- (112) Tucannon River from Umatilla Na-

- tional Forest boundary to headwaters. Class AA
- (113) Twisp River from confluence with Methow River to headwaters. Class AA
- (114) Union River from Bremerton waterworks dam to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (115) Walla Walla River from mouth to Lowden (river mile 15). Class B
- (116) Walla Walla River from Lowden (river mile 15) to Oregon border (river mile 40). Special condition - Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. Class A
- (117) Wenatchee River from Wenatchee National Forest boundary to headwaters. Class AA
- (118) White River (Pierce-King Counties) from Mud Mountain Dam to headwaters. Class AA
- (119) White River (Chelan County) from Lake Wenatchee to headwaters. Class AA
- (120) Willapa River upstream of a line bearing 70° true through Mailboat Slough light. Class A
- (121) Wishkah River from mouth to river mile 6. Class B
- (122) Wishkah River from west fork of Wishkah River to intersection of the river with south boundary of Sec. 33, T.21N., R.8W. Class AA
- (123) Wishkah River from intersection of the river with south boundary of Sec. 33, T.21N., R.8W. to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (124) Yakima River from confluence with Columbia River to Sunnyside Dam. Class B
- (125) Yakima River from Sunnyside Dam to river mile 185.6 (just below the confluence of the Cle Elum River). Special condition - Temperature - water temperatures shall not exceed 21.0° Celsius due to human activities.

When natural conditions exceed 21.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t = 34 / (T + 9)$.

Class A

(126) Yakima River from river mile 185.6 (immediately upstream from the Cle Elum River) to headwaters.

Class AA

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-080, filed 1/17/78; Order DE 73-22, § 173-201-080, filed 11/16/73; Order 73-4, § 173-201-080, filed 7/6/73.]

WAC 173-201-085 Specific classifications—Marine water. Specific marine surface waters of the state of Washington are classified as follows:

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|--|----------|
| (1) Bellingham Bay east of a line bearing 185° true from entrance of boat basin (light No. 2), except as otherwise noted. | Class B |
| (2) Bellingham Bay, inner, easterly of a line bearing 142° true through fixed green navigation light at southeast end of dock (approximately 300 yards northeast of bell buoy "2") to the east boat basin jetty. | Class B |
| (3) Budd Inlet south of latitude 47°04'N. (south of Priest Point Park). | Class B |
| (4) Coastal waters Pacific Ocean from Ilwaco to Cape Flattery. | Class AA |
| (5) Commencement Bay from south and east of a line bearing 258° true from "Brown's point" and north and west of line bearing 225° true through the Hylebos waterway light. | Class A |

- | | |
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| (6) Commencement Bay, inner, from south and east of a line bearing 225° true through Hylebos Waterway light except the city waterway south and east of south 11th Street. | Class B |
| (7) Commencement Bay, city waterway south and east of south 11th Street. | Class C |
| (8) Drayton Harbor, south of entrance. | Class A |
| (9) Dyes and Sinclair Inlets west of longitude 122°37'W. | Class A |
| (10) Elliott Bay east of a line between Pier 91 and Duwamish head. | Class A |
| (11) Everett Harbor east of longitude 122°13'40"W. and southwest of a line bearing 121° true from light "4" (Snohomish River mouth). | Class A |
| (12) Everett Harbor, inner, north and east of a line bearing 121° true from light "4" (Snohomish River mouth). | Class B |
| (13) Grays Harbor west of longitude 123°59'W. | Class A |
| (14) Grays Harbor east of longitude 123°59'W. to longitude 123°45'45"W. (Cosmopolis). Special condition - dissolved oxygen - shall exceed 5.0 mg/l or 60 percent saturation, whichever is greater. | Class B |
| (15) Guemes Channel, Padilla, Samish and Bellingham Bays east of longitude 122°39'W. and north of latitude 48°27'20"N., except as otherwise noted. | Class A |

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| (16) Hood Canal. | Class AA |
| (17) Mukilteo and all North Puget Sound West of longitude 122°39' W. (Whidbey, Fidalgo, Guemes and Lummi Island), except as otherwise noted. | Class AA |
| (18) Oakland Bay west of longitude 123°05'W. (inner Shelton harbor). | Class B |
| (19) Port Angeles south and west of a line bearing 152° true from buoy "2" at the tip of Ediz Hook. | Class A |
| (20) Port Gamble south of latitude 47°51'20"N. | Class A |
| (21) Port Townsend west of a line between Point Hudson and Kala point. | Class A |
| (22) Possession Sound, south of latitude 47°57'N. | Class AA |
| (23) Possession Sound, Port Susan, Saratoga Passage, and Skagit Bay east of Whidbey Island and longitude 122°38'35"W. (bridge) between latitude 47°57'N. (Mukilteo) and latitude 48°27'20"N. (Similk Bay), except as otherwise noted. | Class A |
| (24) Puget Sound through Admiralty Inlet and South Puget Sound, south and west to longitude 122°52'30"W. (Brisco Point) and longitude 122°51'W. (northern tip of Hartstene Island). | Class AA |
| (25) Sequim Bay southward of entrance. | Class AA |
| (26) South Puget Sound west of longitude 122°52'30"W. | Class A |

(Brisco Point) and longitude 122°51'W. (northern tip of Hartstene Island, except as otherwise noted).

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| (27) Strait of Juan de Fuca. | Class AA |
| (28) Willapa Bay seaward of a line bearing 70° true through Mailboat Slough light. | Class A |

[Statutory Authority: RCW 90-48-035. 78-02-043 (Order DE 77-32), § 173-201-085, filed 1/17/78.]

WAC 173-201-090 Achievement considerations. To fully achieve and maintain the foregoing water quality in the state of Washington, it is the intent of the department of ecology to apply the various implementation and enforcement authorities at its disposal, including the development and implementation of the continuing planning process required by the Federal Water Pollution Control Act Amendments of 1972, (P.L. 92-500) and applicable federal regulations thereunder. It is also the intent that cognizance will be taken of the need for information as contemplated under section 304, 208, 209, and other sections of the federal act, with emphasis on silviculture and agriculture, and for participation in cooperative programs with other state agencies and private groups with respect to the management of related problems. The Washington department of ecology's planned program for water pollution control will be defined and revised annually in accordance with section 106 of said federal act and regulations. Further, it shall be required that all activities which discharge wastes into waters within the state, or otherwise adversely affect the quality of said waters, be in compliance with the waste treatment and discharge provisions of state or federal law. [Statutory Authority: RCW 90-48-035. 78-02-043 (Order DE 77-32), § 173-201-090, filed 1/17/78; Order 73-4, § 173-201-090, filed 7/6/73.]

WAC 173-201-100 Implementation. (1) Discharges from municipal, commercial, and industrial operations. The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste disposal permits, as provided for in RCW 90.48.160 and following.

(2) **Miscellaneous Waste Discharge or Water Quality Effect Sources.** The director shall, through the issuance of regulatory permits, directives, and orders, as are appropriate, control miscellaneous waste discharges and water quality effect sources not covered by WAC 173-201-100(1) hereof. It is noted that, from time to time, certain short-term activities which are deemed necessary to accommodate essential activities or to otherwise protect the public interest may be specially authorized by the director as indicated in WAC 173-201-035(8)(e), under such conditions as the director may prescribe, even though such activities may result in a reduction of water quality conditions below those criteria and classifications established by this regulation. [Statutory Authority: RCW 90-48-035. 78-02-043 (Order DE 77-32), § 173-201-100, filed 1/17/78; Order 73-4, § 173-201-100, filed 7/6/73.]

WAC 173-201-110 Surveillance. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

- (1) Inspecting treatment and control facilities.
- (2) Monitoring and reporting waste discharge characteristics.
- (3) Monitoring receiving water quality. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-110, filed 1/17/78; Order 73-4, § 173-201-110, filed 7/6/73.]

WAC 173-201-120 Enforcement. To insure that the provisions of chapter 90.48 RCW, the standards for water quality promulgated herein, the terms of waste disposal permits, and other orders and directives of the department are fully complied with, the following enforcement tools will be relied upon by the department, in cooperation with the attorney general as it deems appropriate:

- (1) Issuance of notices of violation and regulatory orders as provided for in RCW 90.48.120. Under this section, whenever in the opinion of the department a person is violating or about to violate chapter 90.48 RCW, the department shall notify said person of its determination.

Within thirty days said person shall notify the department of the action taken or being taken in response to the department's determination, whereupon the department may issue a regulatory order as it deems appropriate. Whenever the department deems immediate action is necessary to accomplish the purposes of chapter 90.48 RCW, it may issue a regulatory order without first giving notice and thirty days for response.

(2) Initiation of actions requesting injunctive or other appropriate relief in the various courts of the state, as provided for in RCW 90.48.037.

(3) Levying of civil penalties as provided for in RCW 90.48.144. Under this section, the director of the department may levy a civil penalty up to five thousand dollars per day against a person who violates the terms of a waste discharge permit, or who discharges without such a permit when the same is required, or violates the provisions of RCW 90.48.080. If the amount of the penalty, which is subject to mitigation or remission by the department, is not paid within thirty days after receipt of said notice, the attorney general, upon request of the director, shall bring an action in superior court to recover the same.

(4) Initiation of a criminal proceeding by the appropriate county prosecutor, as provided for in RCW 90.48.140.

(5) Issuance of regulatory orders or directives as provided for in RCW 90.48.240. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-120, filed 1/17/78; Order 73-4, § 173-201-120, filed 7/6/73.]

WAC 173-201-130 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-140 Miscellaneous. (1) The water quality criteria adopted in this chapter shall be the sole criteria for the various surface waters in the state of Washington.

(2) The criteria, classifications, and achievement considerations established by this chapter shall be reviewed from time to time by the department to insure that the quality of the waters of the state may be enhanced wherever possible through appropriate modifications of this chapter.

(3) These rules contemplate and it is the specific intent of the department of ecology to continue to evaluate the watercourse classifications under WAC 173-201-070 through 173-201-085 hereof, with special emphasis placed on those waters constituting reaches of streams in nonurban areas, and, if deemed appropriate, initiate rule-making proceedings as to any needed changes in classification. Additionally, the department shall, in light of concerns expressed both for high water quality and for the carrying on of activities on land which have an effect on certain water reaches, continue with expedition to examine all waters of the state, the needs for the protection of the same and related concerns, and if, after such evaluation, it appears appropriate, initiate rule-making procedures to modify this chapter.

The department of ecology has the obligation to review the state water quality standards at least once each three year period. [Statutory Authority: RCW 90.48-.035. 78-02-043 (Order DE 77-32), § 173-201-140, filed 1/17/78; Order 73-4, § 173-201-140, filed 7/6/73.]

APPENDIX M

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under section 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of

such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such

compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been

obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or

permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.